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84-1197

No. 84-

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DEAK-PERERA HAWAII, INC.,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII, *et al.*,
Respondents,

and

CITICORP (USA), INC.,
Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 24, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

2nd

QUESTION PRESENTED

The issue presented on which lower federal courts are divided is whether a state agency, simply by reason of its status as such, is exempt from the federal antitrust laws where its action is neither required nor specifically authorized by the State Legislature.

PARTIES TO THE PROCEEDING

Deak-Perera Hawaii, Inc. (Plaintiff)*

Department of Transportation, State of Hawaii (Defendant)

Ryokichi Higashionna, in his official capacity as the Director of the Department of Transportation for the State of Hawaii (Defendant)

Owen Miyamoto, in his official capacity as Chief of the Airport Division of the Department of Transportation of the State of Hawaii (Defendant)

Citicorp (USA), Inc. (Intervenor on behalf of the Defendants)

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* A list of all parent companies, subsidiaries, and affiliates of Deak-Perera Hawaii, Inc. is contained in the supplemental appendix attached to this Petition pursuant to Rule 28 of this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 745 F.2d 1281 (9th Cir. 1984) and appears in the Appendix hereto (hereinafter referred to as "App. ——") at 1a-5a. The opinion of the United States District Court for the District of Hawaii is reported in 553 F.Supp. 976 (D. Haw. 1983), and appears in the Appendix hereto at 6a-32a.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 26, 1984. No requests for rehearing were filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set forth in the Appendix at 33a-56a. They are as follows:

Sherman Act, §§ 1, 2, 15 U.S.C. §§ 1, 2 (1982)

Haw. Const. Art. V, §§ 5, 6

HAWAII REV. STAT. §§ 261-4, 261-5, 261-7, 261-9, 261-12, 480-12

Act 243, 1981 Hawaii Sess. Laws

Act 90, 1982 Hawaii Sess. Laws

STATEMENT OF THE CASE

Factual Background

In May of 1982, the director of the Department of Transportation of the State of Hawaii (hereinafter "DOT") decided to solicit bids from foreign currency exchange companies for an exclusive five-year lease of all five retail foreign currency exchange concessions at the State-operated Honolulu International Airport, commencing July 1, 1982.

Until the 1982 concession bid, Deak-Perera Hawaii, Inc. had been the only bidder for the retail foreign currency exchange concessions at the airport, and had operated there since 1972. Deak-Perera bid for the new lease, but was out-bid by Citicorp-USA (Intervenor below).

By virtue of the exclusivity of the Citicorp-USA lease, Deak-Perera was thereafter denied the right to operate any business at the airport for the next five years.

The grant of these exclusive foreign currency exchange concessions has never been specifically authorized by the State Legislature.[1] The authority of the director of the DOT to grant such exclusive concessions was based on his general powers as the agency's chief executive officer. The DOT is an administrative agency created under Article V, Section 6 of the Hawaii State Constitution. App. 54a-56a.

Proceedings Below

After losing the bid, but before the new lease was to take effect, Deak-Perera filed the instant action in the District Court of Hawaii, alleging, *inter alia*, that the grant of the exclusive lease by the DOT violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), App. 33a.[2]

Plaintiff Deak-Perera moved for partial summary judgment on the single issue of law of whether the State Defendants and Intervenor Citicorp-USA were shielded from federal antitrust liability by the state action immunity doctrine. The Defendants filed a cross-motion for summary judgment on the same issue. The district court

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[1] The State Legislature has chosen to act only with respect to one of the other airport concessions, which is engaged in the sale of duty-free goods. *See* Acts 243 (1981 Hawaii Sess. Laws) and 90 (1982 Hawaii Sess. Laws) at App. 44a, 48a. The Hawaii Legislature chose to specifically displace competition in this narrow line of commerce and actively supervise the "monopolist". The Hawaii Legislature has not specifically authorized the displacement of competition for any other line of commerce at the airport.

[2] Jurisdiction in the district court was based on the existence of substantial federal questions and pendent state claims. 28 U.S.C. § 1331 (1982).

ruled for the Defendants on both motions. In doing so, the court noted that there was no genuine issue of material fact and that the facts were as stated by Deak-Perera in its memorandum in support of motion for partial summary judgment. (*See* Statement of Facts excerpted from the memorandum, CR 51, App. 57a-60a.)

The district court relied on no affirmative expression of legislative policy requiring the DOT to displace competition at the airport. Instead, it implied sovereignty to the DOT from general enabling statutes.

> The DOT, as an instrumentality of the state, has full power to enter into contracts for concessions at H.A, even though monopolistic in nature, to fulfill its mandate to generate sufficient funds to support the statewide airport system. In all of this, the DOT is authorized and required to act and to act in the name of the State of Hawaii. This court can only conclude, therefore, that when the DOT acts, it is the same, in full part and parcel, as if the State of Hawaii were acting. Therefore, the actions of the DOT, whether they concern contracts or management of Hawaii's airport system, are entitled to state-action immunity as the acts of the State of Hawaii as sovereign.
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> 553 F.Supp. 976, 985 (D. Haw. 1983), App. 24a.

On appeal, the Ninth Circuit affirmed, likewise holding that the general authority granted to the DOT pursuant to the Hawaii Constitution and statutes was tantamount to a conferral of legislative capacity.

REASONS FOR GRANTING THE WRIT

This case presents the next logical development in the unfolding of the *Parker*[3]-*Midcal*[4]-*Hoover*[5] line of state

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[3] Parker v. Brown, 317 U.S. 341 (1943).

[4] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980).

[5] Hoover v. Ronwin, 104 S.Ct. 1989 (1984).

action immunity cases. It raises a substantial and important question of law not explicitly resolved in any prior decision of this Court, a question on which the lower courts are in disarray: Whether a state agency and its officials are entitled to federal antitrust immunity merely by virtue of their status, where their challenged actions were neither required nor specifically authorized by the State Legislature.

I. THE DECISION BELOW IS ERRONEOUS.

Does the grant of general operating authority to a state administrative agency, without more, entitle it to sovereign antitrust immunity? The Ninth Circuit says yes. In so holding, however, the Ninth Circuit has disregarded the rationale of the governing *Parker-Midcal-Hoover* line of cases.

One thread clearly runs through all this Court's recent "state action" decisions: Legislative direction or specific authorization of the challenged restraint must be shown before sovereign "state action" can be found. The Ninth Circuit has found "state action" in the absence of either factor. Review by this Court is clearly appropriate in these circumstances.

A. The Ninth Circuit's decision plainly misinterprets the State action immunity doctrine in a fundamental respect.

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that a state agricultural marketing program was exempt from challenge under the Sherman Act because the program "derived its authority . . . from the legislative command of the state. . . ." 317 U.S. at 350. The principle announced in *Parker* was clear and simple: conduct undertaken by state officials at the direction of the legislature could not constitute a violation of the antitrust laws.

Since *Parker*, the Court has elaborated further on standards for finding "state action". Thus, when a State acts through its legislature (*Parker*) or through its Supreme Court acting in a legislative capacity (*Hoover*), the State is acting as a sovereign; and therefore, without more, such action is immune from Federal antitrust liability.

When a claimed exemption from Federal antitrust liability is based on the action of a subdivision or agency of the State, however, this Court unequivocally and repeatedly has required that two additional showings be made: (1) that the action is pursuant to a "clearly articulated and affirmatively expressed state policy" requiring the challenged restraint; and (2) that the action is "actively supervised" by the State. *Midcal*, 445 U.S. at 105; *Hoover*, 104 S.Ct. at 1995. This Court has insisted on these two additional requirements being met without regard to whether private parties are involved.[6]

The Court's most recent statement of the doctrine is *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984). The Court in *Hoover* found that the conduct at issue (alleged restraints in State bar admission requirements and procedures) was in fact that of the State Supreme Court acting in its legislative capacity. It therefore never reached the issues of state policy and adequate supervision because it found that such conduct was sovereign in nature and therefore exempt from antitrust scrutiny.

In the instant case, the Ninth Circuit has misapplied *Hoover* to mean that a state administrative agency, by reason of its grant of general operating authority from

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[6] The Ninth Circuit apparently regards the two-prong *Midcal* test to be appropriate only when private parties are involved. *See* 745 F.2d at 1283, App. 4a. It is in error, however, in assuming that there is no such involvement in the case at bar. The challenged restraint is a private monopoly of the foreign exchange concessions at the Honolulu International Airport. That monopolist is Citicorp-USA.

the State Legislature, is tantamount to the Legislature or to the State Supreme Court acting in a legislative capacity.

The Hawaii State Legislature has never authorized the DOT to replace entirely free competition with exclusive foreign currency exchange concessions at the Honolulu International Airport. And it is the Legislature, not the DOT, that wields the ultimate decision-making authority for the state in this area. That is evident from the subsequent enactment by the Legislature of an act which authorized an exclusive duty-free concession at the airport. *See* Act 90, 1982 Hawaii Sess. Laws, App. 48a-53a.

The court below plainly ignored the analysis set out in *Hoover*:

> Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization. * * * * In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State. * * * * If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite.
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> 104 S.Ct. at 1995 (citations omitted)

B. The Ninth Circuit has created confusion and uncertainty in the enforcement of the antitrust laws by misapplying the State action immunity tests established by this Court.

The Ninth Circuit reasoned that general enabling statutes conferred sovereign capacity upon the DOT by implication. The test imposed by this Court, however, requires lower courts to discern at the very least an explicit "legislative command of the state". *Parker*, 317 U.S. at 350.

The only Hawaii statutes which may bear any relation to the DOT's authority to control competition among con-

cessionaires at the airport are (a) enabling statutes which generally authorize the department to operate the airport;[7] (b) statutes providing that its acts be in conformance with state and federal laws;[8] and (c) a statute prohibiting the grant of exclusive rights.[9]

The plain language of the Hawaii statutes demonstrates no reference to the restraint challenged by Deak-Perera, *i.e.*, displacement of competition in the retail foreign currency exchange business at the airport. Thus, it is not possible to find that these statutes constitute the "legislative command of the state".

In *Hoover*, the Court underscored the requirement that the activity which may be deemed sovereign be "directly that of the legislature or supreme court". 104 S.Ct. at 1995. When a program "is carried out by others pursuant to state authorization . . . it becomes important to ensure that the anti-competitive conduct of the State's representative was contemplated by the State". *Id.*

The Court thus has made it very clear that a state agency and its officials are not automatically immune, nor have they ever been so categorized. This Court has never granted blanket immunity to any governmental agency merely because of its status. The Ninth Circuit nevertheless held that the DOT was entitled to blanket immunity because of its status as a state agency.

II. THE NINTH CIRCUIT PRESENTS THIS COURT WITH A QUESTION OF SUBSTANTIAL AND RECURRING IMPORTANCE IN THE ADMINISTRATION OF THE FEDERAL ANTITRUST LAWS.

The underlying purpose of federal antitrust laws is to allow competition in the marketplace and protect the consuming public. This policy is so strong that a blanket immunity ought not to be given to a state agency merely

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[7] *See* HAWAII REV. STAT. §§ 261-4, 261-5, 261-7, App. 34a-41a.

[8] *See* HAWAII REV. STAT. §§ 261-9, 261-12, 480-12, App. 41a-43a.

[9] *See* HAWAII REV. STAT. § 261-9, App. 41a.

because of its status. State officials should not be exempt from federal antitrust liability where the state has given no express authority for them to displace basic federal economic policy, and where they fail to actively supervise the specific activity or line of commerce in which competition has been restrained.

Although the instant case involves statutes applicable by their terms only to Hawaii, and to the particular subject of exclusive concessions at airports, the impact of the Ninth Circuit's decision is not so limited. The opinion purports to immunize all members and agencies of the Executive Branch of any state whenever they act in any of the areas where they have statutory powers, at least as long as such powers can be characterized as "public, governmental functions." The lower courts here have ruled, in effect, that subordinate governmental units have automatic and blanket antitrust immunity whenever they engage in any anticompetitive activity in an area where they have statutory powers to act, at least if those powers can be deemed to be "public and governmental" in nature.

State agencies, departments, commissions, boards, and offices are myriad in number and in areas of activity. One may analogize them to the municipalities that have come under this Court's scrutiny in the past. As noted in *City of Lafayette v. Louisiana Power & Light Co.*, the activities of such subordinate governmental units impact on the national economic system in a wide variety of ways. 435 U.S. 389, 407-08 (1978). The economic choices made by such entities, however, are not necessarily likely to comport with the broader economic policies of the antitrust laws. *Id.* at 403. Thus, as stressed in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982), if those units are left free to make such choices based only on their own parochial self interests and without regard for the nation's economic goals embodied in the antitrust laws, serious economic dislocation could result.

The Ninth Circuit's decision here will indeed enable all state agencies and officials in the nation to place their own economic self-interest ahead of the regime of competition which is the fundamental principle governing commerce in this country. *See City of Lafayette*, 435 U.S. at 398. Such a result is directly contrary both to the teachings of the *Parker-Midcal-Hoover* line of cases and to the pro-competitive principles on which those decisions are founded. It is decidedly more far-reaching than that which this Court sought to avoid with its ruling in any of the cases above.

If the decision below is allowed to stand, state agencies and officials will be immune from federal antitrust liability on the fallacious theory that legislative "contemplation" of their anticompetitive activities suffices for state action immunity and can be implied merely from a general statutory scheme.

The issue of agency immunity, therefore, is of substantial importance to the administration of the antitrust laws. It is also of recurring importance. This Court has only to look at the "state action" cases it has decided in the last ten years to discern what the effect of the decision below will be. Most of those cases presented this Court with a fact situation not unlike the case at bar, where the acts at issue were of commissions, boards, and political subdivisions of a state which were *fully empowered* by the state generally to engage in those acts. Under the rationale advanced by the Ninth Circuit in the instant case, the results in those cases would be quite different today. The acts in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) *overruled, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Lafayette*, to name a few, would be exempt in that they proceeded from a general grant of power from the state, but not from a specific authorization to engage in the challenged restraint.

III. THE LOWER FEDERAL COURTS ARE SPLIT ON THE APPLICABILITY OF STATE ACTION IMMUNITY TESTS.

However complete the articulation of the Court's standards for discerning state action may be, the precise question of their application to state administrative agencies and officials has split the lower federal courts.

Courts have diverged onto several streams in this area. There is a line of cases which holds that state agencies and instrumentalities are exempt when the challenged restraint has been contemplated by the state legislature, although the definition of "contemplation" has been in no way precise.[10] There is also a line of cases that provides for exemption when the agency is providing public health and safety functions (as in an ambulance service) or governmental functions (as in a public monopoly).[11] By far the longest line of cases (which in many instances issue from the same courts which issued cases in the lines above) consists of those which have applied the *Midcal* analysis.[12] And then there is the case at bar.

The Ninth Circuit is the first Circuit Court known to Petitioner to apply *Hoover* in exempting a state administrative agency as a sovereign without reaching a *Midcal* analysis. Yet the area of commerce in the case at bar is not a traditional government function dealing with public health and safety. Retail foreign currency exchange is a purely commercial activity which poses no

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[10] *See, e.g.*, Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

[12] *See, e.g.*, Corey v. Look, 641 F.2d 32 (1st Cir. 1981); City of Kirkwood v. Union Electric Company, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982).

[11] *See, e.g.*, Gold Cross Ambulance v. City of Kansas, 705 F.2d 1005 (8th Cir. 1983); E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966).

threat to the safe operation of the airport. As a practical matter, it has no impact on the health and safety of the public. And the activity here is being conducted as a monopoly by a private party, not the state.

Even if the holding of *Hoover* can be extended to exempt state administrative agencies in certain instances in accord with the several lines of cases above (for example, in cases where the state is operating a monopoly or where public health and safety are involved), it cannot lead to an exemption of the DOT in this instance. Where there is no clear legislative mandate and no state supervision of the challenged restraint, and particularly where private parties are involved, such a policy would have deleterious impact on the enforcement of the nation's antitrust laws.

CONCLUSION

The question of law presented is substantial, important and recurring. The lower court decisions in this area of general antitrust enforcement present a confusing picture. A definitive ruling by this Court would therefore serve the public interest.

The petition for certiorari should be granted. Moreover, since the error of the Court of Appeals of the Ninth Circuit in misapplying the state action exemption is so patent, the Court may wish to consider the appropriateness of summary reversal.

Respectfully submitted,

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January 24, 1985

SUPPLEMENTAL APPENDIX

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DEAK-PERERA HAWAII, INC.

Parent Companies

1. Deak & Co., Inc.
2. Foreign Commerce Bank
3. Deak-Perera U.S., Inc.
4. Deak-Perera Delaware, Inc.

Affiliates

1. International Insurance Specialists, S.A.
2. Deak-Perera International Banking Corporation
3. Deak-Perera, Inc.
4. Deak-Perera Finance, Ltd.
5. Tourex Company of America, Inc.
6. Deak-Perera Wall Street, Inc.
7. Eden Flowers, Ltd.
8. Deak-Perera Guam, Inc.
9. Hawaii Mountain View Development Corp.
10. Deak-Pererea Saipan, Inc.
11. Bankhaus Deak & Co., Ltd.
12. Eurotrade Bank & Trust
13. Deak-Perera Trading, Inc.
14. Deak-Perera Far East, Ltd.
15. Deak-Perera Commodities, Ltd.
16. Deak-Perera Bullion, Ltd.
17. Compass Travel, Ltd.
18. Deak & Co. of Macao, Ltd.
19. Compass Commercial Co., Ltd.
20. Deak-Perera Finance Group, Inc.
21. Deak-Perera Futures, Inc.
22. Deak-Perera Securities, Inc.
23. D-P Promotions
24. Deak-Perera Alaska, Inc.
25. Deak-Perera Canada, Inc.
26. Deak-Perera Colorado, Inc.

27. Deak-Perera Boston, Inc.
28. Deak-Perera California, Inc.
29. Deak-Perera Chicago, Inc.
30. Deak-Perera Georgia, Inc.
31. Deak-Perera Connecticut, Inc.
32. Deak-Perera Florida, Inc.
33. Deak-Perera International, Inc.
34. Deak-Perera New Jersey, Inc.
35. Deak-Perera Nevada, Inc.
36. Deak-Perera Puerto Rico, Inc.
37. Deak-Perera Southeast, Inc.
38. Deak-Perera Seattle, Inc.
39. Deak-Perera Texas, Inc.
40. Deak-Perera Washington, Inc.
41. Deak, A.G.

Subsidiaries of Deak-Perera Hawaii, Inc.

None

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APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 83-1552

DEAK-PERERA HAWAII, INC.,
Plaintiff-Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII, *et al.*,
Defendants-Appellees,

and

CITICORP (USA), INC.,
Intervenor-appellee.

Argued and Submitted March 29, 1984

Decided Oct. 26, 1984

Appeal from the United States District Court
for the District of Hawaii

Robert F. Miller, Honolulu, Hawaii, for plaintiff-appellant.

Gerald Y.Y. Chang, Robert A. Rowan, Susan O. Mollway, Cades Schutte Fleming & Wright, Honolulu, Hawaii, for defendants-appellees.

Before GOODWIN and KENNEDY, Circuit Judges, and CURTIS,* District Judge.

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* The Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

GOODWIN, Circuit Judge.

Deak-Perera lost its bid to retain the currency exchange concession at Honolulu International Airport when the Hawaii Department of Transportation awarded a five-year exclusive concession to Citicorp, the highest bidder. Alleging violation of federal and state antitrust laws and state bidding laws, Deak-Perera sued the state agency and two of its officials. We affirm the district court's finding that the defendants were entitled to state action immunity from federal antitrust laws. *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F. Supp. 976 (D. Haw. 1983).

I. *Antitrust immunity*

Actions by " 'the State acting as sovereign,' " *Hoover v. Ronwin*, —— U.S. ——, 104 S.Ct. 1989, 1998, 80 L.Ed.2d 590 (1984), *quoting Bates v. State Bar of Arizona*, 433 U.S. 350, 360, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810 (1977), are immune from the federal antitrust laws. If the State of Hawaii was acting in its sovereign capacity when it granted Citicorp the exclusive lease, it is immune from Deak-Perera's antitrust challenge.

The Department of Transportation, which granted the lease, is part of the executive branch of Hawaii state government. Although *Hoover v. Ronwin* declares that state legislatures and state supreme courts exercising legislative powers have antitrust immunity without further investigation, it expressly leaves open the circumstances under which the activities of a state executive branch are entitled to antitrust immunity. 104 S.Ct. at 1995 n.17.

We hold that the Department's grant of the lease was an action of the State of Hawaii "acting as sovereign" and thus entitled to immunity from the antitrust laws. As the *Hoover* Court notes, the reasoning of *Parker v.*

Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), lays the foundation of the doctrine of state-action antitrust immunity. *Parker* refused to construe the Sherman Act as prohibiting a raisin marketing program carried out by state officials pursuant to a statute enacted by the California legislature:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 350-351, 63 S.Ct. at 313-314.

As *Hoover* puts it, the rationale of *Parker* rests on "principles of federalism and state sovereignty." 104 S.Ct. at 1995. These principles entitle the executive branch of the State of Hawaii to state action immunity. The Hawaii Constitution creates the executive as a co-equal branch of the state government and provides for the establishment of departments under the supervision of the governor, Haw. Const. Art. V § 6; the Department of Transportation is one such department. Haw. Rev. Stat. § 26-19. The Hawaii Constitution charges the governor with "the faithful execution of the laws." Haw. Const. Art. V, § 5. In granting Citicorp the challenged lease, the Department of Transportation, as the governor's subordinate, was fulfilling its constitutional duty to execute Haw. Rev. Stat. § 261-4, which permits the Department of Transportation to establish and operate airports. Haw. Rev. Stat. §§ 261-4(a) and 261-7(a) provide the Department with implied authority to enter into the challenged exclusive lease. That the legislature con-

templated an exclusive lease is emphasized by the non-inclusion of foreign exchange concessions in Haw. Rev. Stat. § 102-2. That statute exempts certain other businesses from bidding requirements for public concessions because of the "danger that such a system of awarding all concessions or concession spaces by bid could result in a monopoly." Act of May 10, 1960, No. 14, § 1, 1960 Hawaii Sess. Laws 16. Here, the required competitive bidding was invited and Citicorp won the competition and obtained a monopoly.

We see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Supreme Court emphasized the importance of a "clearly articulated and affirmatively expressed" state policy, *id.* at 410, 98 S.Ct. at 1135, and specifically rejected the argument that "all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from antitrust laws." *Id.* at 408, 98 S.Ct. at 1134. However, *Lafayette* involved a governmental delegation of authority to private parties. We note that this is not a case of private parties imposing competitive restraints in conjunction with state authorities. In such a case the inquiry would be different. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980); *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272, 274-76 (9th Cir. 1982).[1]

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[1] Part of the board of dental examiners involved in *Benson* was appointed by the governor on recommendations of the state dental association. Arizona Rev. Statutes § 32-1203.

II. *Dismissal of state claim*

There is no federal jurisdiction over Deak-Perera's claim that the state and its officials violated state law. *Penhurst State School & Hospital v. Halderman*, —— U.S. ——, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984).

Conclusion

Because of our holding on state action immunity, we do not reach the state's constitutional defenses. The district court's grant of summary judgment for the Department is affirmed.

UNITED STATES DISTRICT COURT
D. HAWAII

Civ. No. 82-0334

DEAK-PERERA HAWAII, INC., a Hawaii corporation,
Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII; RYOKICHI HIGASHIONNA, in his official capacity as the Director of the Department of Transportation for the State of Hawaii; OWEN MIYAMOTO, in his official capacity as Chief of the Airport Division of the Department of Transportation of the State of Hawaii,
Defendants,

and

CITICORP (U.S.A.), INC.,
Intervenor.

Jan. 3, 1983

As Amended March 7, 1983

Don Gelber and Stephen Gelber, Gelber & Wagner, Wayne Pitluck and Robert Miller, Honolulu, Hawaii, for plaintiff.

Tany S. Hong, Atty. Gen. of Hawaii, Randall Young, Honolulu, Hawaii, for defendants.

Robert A. Rowan, Terry Day, Susan Mollway, Cades Schutte Fleming & Wright, Honolulu, Hawaii, for intervenor.

DECISION

PENCE, Senior District Judge.

This matter came before the court on cross motions for summary judgment pursuant to Rule 56 of the Federal

Rules of Civil Procedure. The arguments were heard on September 1, 1982.

The motions sought to determine the legal issues of whether or not defendants, the State of Hawaii's Department of Transportation, its director Ryokichi Higashionna and Airport Chief Owin Miyamoto (collectively the DOT), were entitled to "state-action immunity" under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or were entitled to Eleventh Amendment immunity; or whether plaintiff, Deak-Perera Hawaii, Inc. ("Deak") was entitled to a permanent injunction and judgments as to violations of state and federal antitrust statutes.

An order was entered on September 2, 1982, granting defendants' motion on the basis of *Parker v. Brown* immunity and denying plaintiff's motion.[1] For the reasons herein given, it was unnecessary for the court to reach the Eleventh Amendment issue or the alleged violation of state and federal antitrust statutes.

FACTUAL BACKGROUND

Hawaii, as an island state, has always been especially dependent upon ships and, more recently, planes for inter-island and mainland communication and transportation.[2] Even before commercial aviation came to the islands, the Territorial legislature had appropriated funds for what has become today the state's commercial airport system for each and all of the Hawaiian islands.[3]

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[1] Order Granting and Denying Motions for Summary Judgment was amended on September 3, 1982, to accelerate dissolving the temporary restraining order when Deak abandoned the premises earlier than expected. The order was further amended by order filed December 1, 1982, after a hearing on plaintiff's motion to alter the previous orders concerning payment of rents due to State.

[2] Horvat, *Above the Pacific* (1966) at 63. Commercial aviation did not begin until 1929. *See* Hawaiian Aeronautics Commission, *First Annual Report*, 1947-48 (1948) at 10.

[3] Act 176, Session Laws of Hawaii 1925. *See* n. 2, *supra*.

The importance of the airport system is further emphasized by the expansion of tourism as a mainstay of the State economy.[4] The nearly four million tourists coming to Hawaii each year from the continental United States, Canada, Japan, Australia, and literally all parts of the globe, depend almost entirely upon the availability of efficient and dependable airport facilities.[5] The development, managment, and financing of the airport system is governed by an enabling Act of the Hawaiian Legislature.[6] In effect, the support of this airport system, under the Legislative mandate, must be met by the Airport Revenue Fund. This is made up of rents, concessions, aircraft landing fees, and the aviation fuel tax. For the last few years, the concession fees have provided the lion's share of the Fund's revenues.[7]

The concession activities at Honolulu International Airport (HIA) encompass the full range of facilities one might find at a large airport. At HIA, the duty-free concession is the largest revenue producer.[8] Other concessions include bars, restaurants, and snack bars; newsstands, fruit and packaged-food stands; barber shop, shoeshine stand, telegrams and flight insurance, and the

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[4] Besides tourism, the other three largest revenue sources for the state are federal government defense spending, sugar, and pineapple growing. Respectfully, the four sources, in 1980, earned: $3.0 billion for tourism; $1.3 billion for defense spending; $594 million for sugar production; and $233 million for pineapple. *See The State of Hawaii Data Book* (1981) at 173.

[5] *See generally Hawaii Business* (Jan. 1982); *Hawaii Business* (Mar. 1982); and *Hawaii Business* (July 1982).

[6] Haw. Rev. Stat. Ch. 261 (Supp. 1981). *See* nn. 32-35, 44, 45, and 48, *infra.*

[7] In fiscal year 1981, the concession fees amounts to 76% of operating revenues. *See DOT Annual Report* (1982) at 30.

[8] *See Defendant State of Hawaii's Pre-Trial Brief*, filed Aug. 20, 1982, at 7.

parking lot.[9] Also, the Bank of Hawaii maintains a branch at HIA.[10]

Most of these concessions are "exclusive", including the ground transportation for rent-a-car, airport shuttle bus, and airport taxi.[11] The lei stands are about the only "non-exclusive" concessions at HIA.[12]

For the past twenty years, Deak has operated foreign exchange concessions at HIA. For the last ten years, Deak has enjoyed exclusive contracts between itself and the Department of Transportation for the HIA foreign exchange concession.[13] In the 1982 bids, Deak lost the bid to Citicorp (USA), Inc.,[14] which bid almost two and one-half (2½) times as much as Deak for the five-year exclusive concession.

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[9] *Ibid.*

[10] Bank of Hawaii, Airport Branch, also provides some limited foreign currency exchange. However, the amount may be considered as *de minimus* relative to the whole market at HIA.

[11] Each of the "exclusive" ground transportation contracts at HIA is involved in an antitrust suit: Civ. No. 79-0146, *Pacific Auto Rental Corp. dba Dollar Rent-A-Car Systems v. State of Hawaii, et al.*, filed April 2, 1979; Civ. No. 79-0383, *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., et al.*, filed August 31, 1979; and Civ. No. 80-0060, *Charley's Tour & Transportation, Inc. v. Interisland Resorts, Ltd., et al.*, filed February 2, 1980. The *Pacific Auto* case has been consolidated in M.D.L. No. 338, *Airport Car Rental Antitrust Litigation* and is assigned to District Judge William W. Schwarzer in the Northern District of California.

[12] *See* n. 8, *supra.*

[13] Deak was the "sole bidder" in both 1972 and 1977 for five-year exclusive contracts. Three bids were received by June 17, 1982, for the exclusive five-year contract to commence July 1st. At the opening it appeared Citicorp (USA), Inc. was the high bidder at $1.25 million for the five years. Deak was second high bidder at $505,000 for the same period. Deak immediately filed the present action.

[14] Citicorp (USA), Inc. is a Delaware corporation and a subsidiary of Citibank International. Citibank International originally

The foreign exchange concession at HIA consists of five physical locations. Only one of these locations is sufficiently large enough for office space and a secure area, as well as counter; all others are merely counter space.[15] Deak has also maintained a sixth location at the Japan Airlines lounge servicing passengers under a private contractual agreement with that airline.[16]

DECISION

The gravamen of plaintiff's action is that defendants have violated federal antitrust law by the issuance of an exclusive lease for the foreign exchange concession at HIA.[17] Defendants have responded that they are shielded from such a suit under the *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), state-action im-

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attempted to intervene. Such was denied after a finding that Citicorp (USA), Inc. was the proper party in interest. Eventually, Citicorp (USA), Inc. did intervene in its own right and has submitted briefs and argued to this court on behalf of the state's motions.

[15] The locations are designated as Space No. 346-118 comprising counter area of 121 square feet; Space No. 346-111A comprising counter area of 196 square feet; Space No. 344-237 comprising counter area of 25 square feet; Space No. 344-210 comprising counter space of 68 square feet (soon to be replaced by Space No. 344-222A under construction); and Space No. 342-262 comprising counter and office area of 690 square feet.

[16] This was apparently a portable booth arrangement used only for the "package tour" groups arriving on Japan Airlines.

[17] The antitrust claims are brought under both the Sherman Act, 15 U.S.C. §§ 1 & 2; and the Clayton Act, 15 U.S.C. § 16. Plaintiff also alleges violations of state antitrust laws and violations of state bidding procedures. The latter count, on bidding procedures, has been dismissed by a previous order (Order Granting Intervenor's Motions for Dismissal of Count V and for Protective Order, filed September 2, 1982). The other counts need not be reached unless plaintiff hurdles the defenses to the alleged Sherman Act violations.

munity doctrine. For the DOT to have state-action immunity in its grant of the exclusive concession here in question, it must either show that (1) it is an agent or instrumentality of the state acting as sovereign and as such is entitled to state-action immunity; or (2) as an independent political subdivision, it meets the criteria of the *California Retail Liquor Dealers' Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) two-prong analysis (the *Midcal* Test), viz: a clearly articulated and affirmatively expressed state policy with adequate review and supervision by the state.

PART I: *PARKER v. BROWN* STATE-ACTION IMMUNITY

Here, as in all decisions on claims of state-action immunity, the perimeters of state-action immunity as defined in *Parker v. Brown* and refined in its progeny must be clearly understood.[18] Actually, it is a misconception to say that the state-action doctrine was "defined" in *Parker v. Brown*, the doctrine has always existed in our federalist system, and *Parker v. Brown* merely restated and applied that doctrine to the antitrust laws:

> In a dual system of government in which, under the Constitution states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's

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[18] *Community Communications Co., Inc. v. City of Boulder, Colorado*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *California Retail Liquor Dealers' Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), *reh. denied* 423 U.S. 886, 96 S.Ct. 162, 46 L.Ed.2d 118 (1975), and *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978) to cite but a few.

> control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 351, 63 S.Ct. at 313.

The United States Supreme Court has not decided a state-action case based on the state acting as sovereign since *Parker*.[19] In the *Parker* decision, Mr. Chief Justice Stone approvingly cited *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895),[20] which held that South Carolina's regulation of the liquor trade was the act of a state as sovereign. The fact that the law was administered by certain state agents did not create a monopoly for and in those individuals and thus preclude immunity from the federal antitrust laws.[21]

In *Parker*, the Court had to decide the further question of whether state-action immunity could be extended to give protection to "private" individuals—the raisin growers. To that end, the Court examined the state's involvement in the regulation of raisin price setting. The Court determined that the state involvement was suffi-

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[19] 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). *See also* n. 18. All of these cases address the extension of state-action immunity to persons or corporations claiming immunity under state authority. None of the cases suggest that the state is acting as sovereign and that such action is being questioned.

[20] Chief Justice Stone cited *Lowenstein* to compare it with *Olsen v. Smith*, 195 U.S. 332, 25 S.Ct. 52, 49 L.Ed. 224 (1904). *Olsen* held that a state may regulate pilotage, even though such regulates commerce, until such time as federal laws should override or preempt the area. The comparison was that in *Lowenstein* the lower court held that a state was neither a "person" nor a "corporation" within the meaning of the Act of Congress dealing with monopolies and trusts. Therefore, the South Carolina law regulating the liquor trade was a state monopoly enforced by the governor, secretary of state, and controller. The law did not create a monopoly in those individuals; rather, they were mere instrumentalities of the state acting as and for the state. As such, the monopoly was immune from antitrust prosecution as an action of the state as sovereign.

[21] *Ibid.*

cient since the regulation was mandated by state law; the recommended prices were reviewed by the state commission; and the final decision rested with the state acting through the State Agriculture Proration Advisory Commission. 317 U.S. at 346-350, 63 S.Ct. at 311-13.

In short, the *Parker* Court found that the raisin prorate program derived its authority from the legislative command of the state and was not designed to create a monopoly by force of individual agreement or combination. The Court concludes that:

> We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

317 U.S. at 350-351, 63 S.Ct. at 313.

The Court noted that while a state may be considered a "person" for purposes of suing under the antitrust laws, the State of California was not in that category of "persons" that the Sherman Act intended to restrain. 317 U.S. at 351, 63 S.Ct. at 313, (citing *Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346 (1942)).

Parker v. Brown, and most of its progeny, have never denied nor even suggested that Congress intended to subject states, as sovereigns, to federal antitrust laws. Rather, all have denied immunity to "private parties" or "political subdivisions" seeking to cloak their alleged monopolistic actions under the "gauzy cloak of state involvement".[22] In each recent case before the Supreme Court, the question has been whether some entity other than the state may claim state-action immunity. None of those cases has held that a state acting in its sovereign capacity should be denied immunity from federal antitrust laws.

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[22] *See generally* n. 18, *supra*. *See specifically Midcal*, 445 U.S. at 106, 100 S.Ct. at 943.

All of those decisions are perfectly consistent with our federalist system and the purpose of the federal antitrust laws viz., to protect the public from unreasonable interference with competition in interstate and foreign commerce. Where private parties are attempting to monopolize an area of trade, the public has every right to expect protection; with governmental bodies, the people have a more direct recourse—the vote.

While federal laws can override state laws which are inconsistent with national law,[23] the Sherman Act has not been interpreted to override all state laws which impinge on competition. In the latter situation, when it is not clear the state is acting as a sovereign, the crucial questions are whether there has been a "clearly articulated and affirmatively expressed" state policy, and if that policy is being "actively supervised" by the state. *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 at 410, 98 S.Ct. 1123 at 1135, 55 L.Ed.2d 364).[24] The *Midcal* test was neither new nor unexpected when applied to "*private* individuals" seeking state-action immunity,[25] but the application of the *Midcal* test to "*public* officials, agencies and treasuries" has created substantial

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[23] *Cf. Bates v. State Bar*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). *See also Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973).

[24] Actually one may argue that this test was applied in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In that case, the court sought to determine whether or not the state was the controlling force behind the raisin subsidy. In effect, the court was looking for adequate state authority to fix the price and sufficient state involvement in review of the price set by the private raisin growers. Chief Justice Stone did so find.

[25] *See Goldfarb*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Cantor*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); and *Bates v. State Bar*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

confusion and apprehension both in the courts and in public officials generally.[26]

Nevertheless, even after *Lafayette* and *Midcal*, and even after *Community Communications Co., Inc. v. City of Boulder, Colorado*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed. 2d 810 (1982), it is still clear that a state acting as sovereign, is immune from federal antitrust laws unless such laws are overridden by specific national laws.[27] Therefore, this court must initially determine whether or not the DOT was acting as "the state" or as some independent "political subdivision". If DOT acted "as the state", then obviously it can be afforded state-action immunity; if it was acting independently and was merely seeking to protect itself under some "gauzy cloak of state involvement", then the court must continue on to the *Midcal* test.

The cases of *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), and *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), underscore the need for this court to examine the threshold question of whether or not the challenged acts are done by the state in its sovereign capacity, before considering a secondary examination under *Midcal*.

Wiggins dealt with the authority of the Massachusetts Port Authority (MPA) to enter into exclusive contracts in the operation of Logan and Butler-Boston Airports.

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[26] Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 438-439. *See also Lafayette*, 435 U.S. at 440-441 and 441 n. 32, 98 S.Ct. at 1150 and 1151 n. 32 (dissenting opinion of Stevens, J.).

[27] *See* nn. 18 and 23, *supra*. An examination of these cases indicates none dealt with a state acting as sovereign. Rather, all concerned attempts by private individuals or independent political subdivisions seeking immunity for their actions under the "gauzy cloak of state involvement."

The court held that the MPA was an "instrumentality or agency" of the Commonwealth of Massachusetts and, as such, was acting in an official capacity for and as the state. 362 F.2d at 55-56. In essence, the court found the MPA was acting for the state in the exercise of a valid state governmental function and, therefore, was entitled to state-action immunity under *Parker*. *Id.* at 55.

In *Petrofina*, the State of New Mexico brought suit for alleged antitrust violations by various asphalt suppliers. The defendants counterclaimed that the state and some of its political subdivisions had conspired in violation of the Sherman Act. After discussing the meaning of the word "person" in the Sherman Act,[28] and examining the purpose of the Sherman Act in relation to the acts of a state as sovereign, the court stated:

> Since the suit here is directly against the state, there can be no such question [as to whether or not the conduct was committed by the state], and the *Whitten* [*George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir. 1970)] [29] analysis is inapplicable. [Footnote omitted.] The "legislative mandate" test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the de-

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[28] The appellate court distinguished the definition of "person" in *Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346 (1942) as permitting a state to bring suit as a "person" under the Sherman Act with the definition in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) as not permitting a state to be sued as a "person" under the same act.

[29] The *Whitten* test was a precursor to the *Midcal* analysis of whether or not there has been a "clearly articulated and affirmatively expressed" state policy and, if so, whether it was being "actively supervised" by the state. In the omitted footnote in *Petrofina*, the court opined that there could not be any valid argument that a county was a private party masquerading under the umbrella of state authority. 501 F.2d at 370, n. 15.

fendant is the state, the "legislative mandate" analysis is unnecessary.

501 F.2d at 370.

More recent Ninth Circuit cases and the United States Supreme Court cases since 1974 have indicated that there now is even more than a "valid argument" against "automatically" giving counties and cities state-action immunity.[30] Such political subdivisions may be subjected to the *Midcal* analysis. However, nothing since *Petrofina* has eroded its central theme that when it is the state itself being sued or acting, then it is entitled to *Parker* immunity against the Sherman Act and the *Midcal* analysis is "unnecessary".[31]

The DOT is legally an instrumentality of the State of Hawaii. It is clearly to be distinguished from an inde-

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[30] *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982) (amended opinion) citing *Lafayette*, 435 U.S. at 408; and *City of Boulder*, 455 U.S. 40, 102 S.Ct. at 842, state that the Court has rejected such automatic extension of *Parker* immunity to government entities "simply by reason of their status as such." *See also, Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272 (9th Cir. March 29, 1982); *Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222 (9th Cir. 1982); and *Knudsen v. Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982).

Because of the rather unclear and incorrect analysis as to what sort of "government entities" might require *Midcal* analysis other than a "state commission, state board, and a state department" mentioned in *Ronwin*, this court has performed a *Midcal* analysis for this case, *infra*, Part II.

[31] As has been suggested earlier, *Parker*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) and all of its progeny, including *City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), have dealt only with political subdivisions seeking to assume the immunity granted to a state as sovereign. None of the United States Supreme Court decisions hold or suggest that the *states* acting as sovereigns through their officers and agents are to be denied state-action immunity. The section on *Midcal* analysis as applied to the present case, *infra*, demonstrates why such a holding would be logically superfluous.

pendent "political subdivision" of a state, such as a city or county and their administrative instrumentalities. Obviously, the latter fall under the *Lafayette-Midcal* rubric and would be subject to *Midcal*'s additional two-prong test. For the purposes of this case, it is manifest that the DOT has been delegated the responsibility for the construction, operation and maintenance of all the state-operated commercial airports in Hawaii.[32] The

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[32] Haw. Const. Art. V, § 6 provides for not more than twenty principal departments under the supervision of the governor. Haw. Rev. Stat. Ch. 26 creates seventeen executive departments; Haw. Rev. Stat. § 26-19 provides for a department of transportation, headed by a director which "shall establish, maintain, and operate transportation facilities of the State, including highways, airports, harbors. . . ."

Haw. Rev. Stat. § 261-4:

> § 261-4 *Airports, general.* (a) Establishment, operation, maintenance. The department of transportation may on behalf of and in the name of the State, out of appropriations and other moneys available or made available for such purposes, plan, acquire, and establish, construct, enlarge, and improve in the manner herein provided, maintain, equip, operate, regulate, and protect, airports and air navigation facilities, including the construction, installation, equipment, maintenance, and operation at airports of buildings and other facilities for the servicing of aircraft or for the comfort, accommodation, and convenience of air travelers, and including protection against airport hazards. For such purposes the department may, by purchase, gift, devise, lease, condemnation in accordance with chapter 101, or otherwise, acquire property, real or personal, or any interest therein, including the property, rights, estates, and interests mentioned in section 262-11. The department may acquire rights and interests in airports owned or controlled by others, for the purpose of meeting a civilian need which is within the scope of its functions, even though it does not have the exclusive control and operation of such airports. No officer, board, or department of the State, or municipality, shall perform any function which is within the jurisdiction of the department without its approval, except for military purposes.
>
> (b) Acquisition of real property. In the acquisition of real property and interests therein, the department of accounting

operations of the state's airports are expressly recognized as "public and governmental functions, exercised for a public purpose, and matters of public necessity." [33] Under

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and general services shall assist the department of transportation at its request, and assign thereto state officers and employees under its supervision for the making of surveys, abstracts, and otherwise as may be of assistance, for which services the department of transportation shall pay out of the appropriations available to it, unless the department of accounting and general services has a general fund appropriation for such services.

(c) Structures and improvements. All structures and improvements to land shall be initiated by the department of transportation and shall be constructed or made by or under the comptroller, in conformity with plans and specifications approved by the department of transportation, for which purpose the department of transportation shall make allotments of the funds under its control for expenditure by the comptroller and for services of the department of accounting and general services for which the department has no general fund appropriation.

(d) Use of state and municipal facilities and services. In carrying out this chapter, the department of transportation may use the facilities and services of other agencies of the State and of the municipalities of the State to the utmost extent possible, and the agencies and municipalities shall make available their facilities and services. This subsection shall apply to the department of accounting and general services with respect to services and facilities in addition to those specified by subsections (b) and (c). [L 1947, c 32, pt of § 1; RL 1955, § 15-9; am L Sp 1959 2d, c 1, §§ 12, 26]

[33] Haw. Rev. Stat. § 261-11:

§ 261-11 *Public purpose of activities.* The acquisition of any lands or interests therein pursuant to this chapter, the planning, acquisition, establishment, construction, improvement, maintenance, equipment, and operation of airports and air navigation facilities; and the exercise of any other powers granted by this chapter to the department of transportation are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity. All lands and other property and privileges acquired and used by or on behalf of the State in the manner and for the purposes enumerated in

other sections of Hawaii Revised Statutes, the DOT is authorized to enter into contracts to provide for goods and services at the airports,[34] and is required to "gen-

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this chapter shall and are declared to be acquired and used for public and governmental purposes and as a matter of public necessity. [L 1947, c 32, pt. of § 1; RL 1955, § 15-17; am L Sp 1959 2d, c 1, § 26]

[34] Haw. Rev. Stat. § 261-7:

§ 261-7 *Operation and use privileges.* (a) Under department operation. In operating an airport or air navigation facility owned or controlled by the department of transportation, or in which it has a right or interest, the department may enter into contracts, leases, licenses, and other arrangements with any person:

(1) Granting the privilege of using or improving the airport or air navigation facility or any portion or facility thereof or space therein for commercial purposes;

(2) Conferring the privilege of supplying goods commodities, things, services, or facilities at the airport or air navigation facility;

(3) Making available services, facilities, goods, commodities, or other things to be furnishd by the department or its agents at the airport or air navigation facility; or

(4) Granting the use and occupancy on a temporary basis by license or otherwise any portion of the land under its jurisdiction which for the time being may not be required by the department so that it may put the area to economic use and thereby derive revenue therefrom.

All the arrangements shall contain a clause that the land may be repossessed by the department when needed for aeronautics purposes upon giving the tenant temporarily occupying the same not less than thirty days' notice in writing of intention to repossess.

Except as otherwise provided in this section, in each case mentioned in paragraphs (1), (2), (3) and (4), the department may establish the terms and conditions of the contract, lease, license, or other arrangement, and may fix the charges, rentals, or fees for the privileges, services, or things granted, conferred, or made available, for the purpose of meeting the expenditures of the statewide system of airports set forth in

section 261-5(a), which includes expenditures for capital improvement projects approved by the legislature. Such charges shall be reasonable and uniform for the same class of privilege, service, or thing.

The department shall enter into separate contracts with no more than two persons ("contractors") for the sale and delivery of in-bond merchandise at Honolulu International Airport, in the manner provided by law. Each such contract shall confer the right to operate and maintain commercial facilities within the airport for the sale of in-bond merchandise and the right to deliver to the airport in-bond merchandise for sale to departing foreign-bound passengers.

The department shall grant such contracts pursuant to the laws of this State and may take into consideration:

(1) The payments to be made on in-bond merchandise sold at Honolulu International Airport and on in-bond merchandise displayed or sold elsewhere in the State and delivered to the airport;

(2) The ability of the applicant to comply with all federal and state rules and regulations concerning the sale and delivery of in-bond merchandise; and

(3) The reputation, experience, and financial capability of the applicant.

The department shall actively supervise the operation of the contractors to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations of such contractors, and shall include guidelines relating to the department's review of the reasonableness of contractors' price schedules, quality of merchandise, merchandise assortment, operations, and service to customers.

Apart from the contracts described above, during the period ending June 30, 1982, the department shall confer no right upon any person to offer to sell, sell, or deliver in-bond merchandise at Honolulu International Airport.

(b) Under other operation. The department may, by contract, lease, or other arrangement, upon a consideration fixed by it, grant to any qualified person the privilege of operating, as agent of the State or otherwise, any airport owned or controlled by the department; provided that no such person shall be granted any authority to operate the airport other than as

erate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports." [35]

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a public airport or to enter into any contracts, leases, or other arrangements in connection with the operation of the airport which the department might not have undertaken under subsection (a) of this section.

(c) Miscellaneous fees and charges. The department may fix and regulate, from time to time, reasonable landing fees for aircraft and other reasonable charges for the use and enjoyment of the airports and the services and facilities furnished by the department in connection therewith, including the establishment of a statewide landing fee which may vary among different classes of users such as foreign carriers, domestic carriers, inter-island carriers, air taxi operators and such other classes as may be determined by the director of transportation, for the purpose of meeting the expenditures of the statewide system of airports set forth in section 261-5(a), which includes expenditures for capital improvement projects approved by the legislature.

(d) Liens. To enforce the payment of any charges for repairs or improvements to, or storage or care of any personal property made or furnished by the department or its agent in connection with the operation of an airport or air navigation facility owned or operated by the department, the department shall have liens on the property, which shall be enforceable by it as provided by sections 507-18 to 507-22.

(e) Buildings and land areas for general aviation activities; developmental rates. The department may from time to time establish developmental rates for buildings and land areas used exclusively for general aviation activities at rates not less than fifty per cent of the fair market rentals of the buildings and land areas and may restrict the extent of buildings and land areas to be utilized. [L 1947, c 32, pt of § 1; am L 1949, c 374, § 1; am L 1953, JR 14; § 1; RL 1955, § 15-12; am L Sp 1959 2d, c 1, § 26; am L 1962, c 24, §§ 4, 5; HRS § 261-7; am L 1968, c 20, §§ 3, 4; am L 1972, c 14, § 1; am L 1976, c 235, § 2; am L 1981, c 243, § 2]

[35] Haw. Rev. Stat. § 261-5:

§ 261-5 *Disposition of airport revenue fund.* (a) All moneys received by the department of transportation from rents, fees

The function of the airport system in Hawaii must be viewed as a fundamental government function.[36] Much as schools, police services, and fire protection, the airport system is vital to the State of Hawaii from both functional and economic points of view.[37] As such, actions taken to manage and develop the airport system must initially be viewed as acts of the state in its sovereign capacity for the public good. Under these circumstances,

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and other charges pursuant to this chapter as well as all aviation fuel taxes paid pursuant to section 243-4(a)(2) shall be paid into the airport revenue fund created by section 248-8. All such moneys paid into the airport revenue fund shall be expended by the department for the statewide system of airports, including the construction of airports and air navigation facilities approved by the legislature, including acquisition of real property and interests therein; and for operation and maintenance of airports and air navigation facilities; and for the payment of indebtedness heretofore or hereafter incurred by the department, or its predecessor, the Hawaii aeronautics commission, for any of the purposes of this chapter. The department shall generate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports and to comply with section 39-59; provided that as long as sufficient revenues are generated to meet such expenditures, the director of transportation may, in his discretion, grant a rebate of the aviation fuel taxes paid into the airport revenue fund during a fiscal year pursuant to sections 243-4(a)(2) and 248-8 to any person who has paid airport use charges or landing fees during such fiscal year. Such rebate may be granted during the next succeeding fiscal year but shall not exceed one-half cent per gallon per person, and shall be computed on the total number of gallons for which the tax was paid by such person, for such fiscal year.

(b) All expenditures by the department shall be made on vouchers duly approved by the director of transportation or such other officer as may be designated by the director. [L 1947, c 32, pt of § 1; RL 1955, § 15-10; am L Sp 1959 2d, c 1, § 26; am L 1962, c 24, §§ 2, 3; HRS § 261-5; am L 1968, c 20, § 2; am L 1969, c 10, § 6 and c 99, § 1]

[36] *See* n. 33, *supra*.

[37] *See* nn. 1-5, *supra*.

a court must be most cautious about attempting to impose a hindrance or unnecessary burden upon the public officials in the execution of this public duty.[38]

The DOT, therefore, acts as the state in matters concerning the management of HIA. The DOT, as an instrumentality of the state, has full power to enter into contracts for concessions at HIA, even though monopolistic in nature, to fulfill its mandate to generate sufficient funds to support the statewide airport system. In all of this, the DOT is authorized and required to act and to act in the name of the State of Hawaii. This court can only conclude, therefore, that when the DOT acts, it is the same, in full part and parcel, as if the State of Hawaii were acting. Therefore, the actions of the DOT, whether they concern contracts or management of Hawaii's airport system, are entitled to state-action immunity as the acts of the State of Hawaii as sovereign.

PART II: THE *MIDCAL* ANALYSIS

Were it not for what Judge Ferguson, in dissent, in *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982), characterized as the application of "erroneous standards" [39] by the majority in determining whether the state agency there in question was exempt from antitrust laws, this court would not feel *compelled* to apply the *Midcal* analysis to this case. However, while this court agrees with Judge Ferguson that "[t]he majority incorrectly applies a test of compulsion by asking whether the action of the Committee [on Examinations and Admissions] was *required* by the state supreme court" (emphasis in original), thereby applying a *Midcal* analysis to "public" as well as "private" conduct, such an analysis has been made. Having made the analysis, this court finds that even if it were assumed that the DOT

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[38] *See* n. 26, *supra*.

[39] *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982).

is merely a "political subdivision" of the state, there is ample authority from and supervision by the state to satisfy the *Midcal* test.

The *Midcal* case dealt with the necessity of filing fair trade contracts or price schedules with the State of California. *California Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 99, 100 S.Ct. 937, 940, 63 L.Ed.2d 233 (1980). Wholesalers had to post a resale price schedule and no state-licensed wine merchant could sell wine to a retailer at other than the posted effective price. Midcal Aluminum, Inc., a southern California distributor of wine, challenged the wine pricing system as a restraint on trade in violation of the Sherman Act.

The *Midcal* Court initially noted, in its review of the state court's decision, that "[t]he State [had] no direct control over wine prices, and it [did] not review the reasonableness of the prices set by the wine dealers." *Midcal*, 445 U.S. at 100, 100 S.Ct. at 940.[40] The Court then continued on to decide whether or not *Parker* immunity should apply absent direct control of an activity which appeared to violate the policies of the Sherman Act. *Id.* at 103-104, 100 S.Ct. at 942.

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[40] *Cf. Lowenstein v. Evans*, 69 F. 908 (C.C.D. S.C. 1895). In *Lowenstein*, a state also sought to control the liquor trade. However, South Carolina exercised direct control and management over the pricing and sale of all liquors. *Cf. Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978) in which the prices were established by the producers with the state exercising no control or pointed re-examination of those prices to insure that policies of the Sherman Act are not unnecessarily subordinated. 21 Cal.3d at 445, 146 Cal. Rptr. at 594, 579 P.2d at 486. While the Court indicates that the threshold question is whether the action violates the Sherman Act, *Midcal*, 445 U.S. at 102, 100 S.Ct. at 941, the threshold question in that inquiry is the extent of direct control and supervision of the activity by the state, such as to provide *Parker* immunity. 445 U.S. at 103-104, 100 S.Ct. at 942. It is only after a failure at this hurdle that the Court must continue on to examine the extent of the state's mandate and review of the activity. Obviously if the Court had found direct state action and control there is no need for further examination.

Reviewing its recent cases,[41] the *Midcal* Court outlined the analysis which must be followed where it is not evident at the threshold that the state is exercising direct control as a sovereign over the activity. The analysis was first stated in *Lafayette*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed. 364 (1978), and consists of a two-prong test:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 [98 S.Ct. 1123, 1135, 55 L.Ed.2d 364] (1978) (opinion of Brennan, J.). [Footnote omitted.]

445 U.S. at 105, 100 S.Ct. at 943.

Examining the legislative enactment to determine if it satisfied the first prong, the Court held that it did forthrightly state a clear purpose to mandate resale price maintenance. *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943. However, the Court found that the program failed to satisfy the second prong—the state failed to regulate prices or monitor market conditions or engage in any "pointed re-examination" of the program. *Id.* at 105-106, 100 S.Ct. at 943. The Court then stated that *Parker* teaches " 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .' 317 U.S. at 351 [63 S.Ct. at 313]." *Id.* at 106, 100 S.Ct. at 943. The question in *Midcal* concerned the state's participation in and control of the legislatively authorized activity violating the Sherman Act.

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[41] *See* n. 18, *supra*. This two-prong analysis was reaffirmed in the recent *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). *City of Boulder* also reaffirmed the state's powers and immunity as a sovereign under the Constitution. 455 U.S. at 53, 102 S.Ct. at 842. In advancing the *Midcal* analysis, the High Court merely declined to "automatically" extend the state sovereign's right to *Parker* immunity to "cities, counties, and other organized bodies." *Ibid.*

In this case, the state authorization for the DOT's action on the concession contracts at HIA can be found in the Hawaii Revised Statutes under Title 15—Transportation and Utilities, Chapter 261 Aeronautics. Section 261-4(a) directs the DOT to

> maintain, equip, operate, regulate, and protect, airports and air navigation facilities, including . . . maintenance, and operation at airports of buildings and other facilities . . . for the comfort, accommodation, and convenience of air travelers . . . .[42]

To these ends, § 261-7 permits the DOT to

> enter into contracts, leases, licenses, and other arrangements with any person:
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> * * * *
>
> (2) Conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility . . . .[43]

Further, per § 261-7, the DOT may establish the "terms and conditions of the contract".[44]

This language is reiterated in H.R.S. § 261-9—Contracts, law governing;[45] and H.R.S. § 261-10—Exclusive

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[42] *See* n. 32, *supra*, for full text of § 261-4.

[43] *See* n. 34, *supra*, for full text of § 261-7.

[44] *Ibid.*

[45] Haw. Rev. Stat. § 261-9:

> § 261-9 *Contracts, law governing.* The department of transportation may enter into any contracts necessary to the execution of the powers granted it by this chapter. All contracts made by the department shall be made pursuant to the laws of the State governing the making of like contracts; provided, that where the planning, acquisition, construction, improvement, maintenance, or operation of any airport, or air navigation facility is financed wholly or partially with federal moneys, the department may let contracts in the manner prescribed by the federal authorities acting under the laws of the United

rights prohibited.[46] In the latter, while the state forbids exclusive contracts as to the "use of an airway, landing area, or air navigation facility," the section also specifically says "[t]his section shall not prevent the making of contracts, leases, and other arrangements pursuant to section 261-7."[47] This broad grant of authority to the DOT is limited only by directives to manage the airport system in the best interest of the public and to generate sufficient revenue to support the statewide airport system. There can be no reasonable doubt that the state has authorized the DOT to act as its agent in the managing and financing its airport system.

Additionally, the expressed goals of this legislation, as stated in H.R.S. § 261-11, are that the airport system

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States and any rules or regulations made thereunder. [L 1947, c 32, pt of § 1; RL 1955, § 15-15; am L Sp 1959 2d, c 1, § 26]

[46] Haw. Rev. Stat. § 261-10:

§ 261-10 *Exclusive rights prohibited.* The department of transportation shall grant no exclusive right for the use of an airway, landing area, or air navigation facility under its jurisdiction. This section shall not prevent the making of contracts, leases, and other arrangements pursuant to section 261-7. [L 1947, c 32, pt of § 1; RL 1955, § 15-16; am L Sp 1959, 2d, c 1, § 26]

[47] Read in conjunction with the broad powers enunciated in § 261-7, it is clear that the legislature has considered and condones the use of exclusive contracts by DOT and its various concessioners. Indeed in one case the legislature experimented in 1981 (H.B. 1470, Act 243 of the 1981 Session Laws) with specifically requiring the DOT to provide at least two duty-free in-bond concessions at the airport and then finding that unacceptable, not only returned the statute to the status quo, but mandated a sole source duty-free in-bond concession at the airport. (Act 90, S.B. 2261-82 S.D.2 of the 1982 Session Laws.) This approval of exclusive contracts by the legislature emphasizes the already clear mandate by the state that DOT has the power and authority to enter such contracts with such parties as will best serve the public's interest and provide adequate funds for the airport system. *See also* nn. 32, 33 & 35, *supra.*

is to be "used for public and governmental purposes and as a matter of public necessity".[48] The exercise of these powers is considered to be "public and governmental functions."[49] This clearly satisfies the first prong of the *Midcal* test.

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[48] *See* n. 33, *supra*, for full text of § 261-11.

[49] *Ibid. See also* Haw. Rev. Stat. § 261-12:

§ 261-12 *Rules, standards.* (a) Powers to adopt. The director of transportation may perform such acts, issue and amend such orders, adopt such reasonable general or special rules and procedures, and establish such minimum standards, consistent with this chapter, as the director deems necessary to carry out this chapter and to perform the duties assigned thereunder, all commensurate with and for the purpose of protecting and insuring the general public interest and safety, the safety of persons operating, using, or traveling in aircraft, and the safety of persons and property on land or water, and developing and promoting aeronautics in the State. No rule of the director shall apply to airports or air navigation facilities owned or operated by the United States.

In furtherance of the duties assigned under this chapter, the director may adopt rules relating to:

(1) Safety measures, requirements and practices in or about the airport premises;

(2) The licensing and regulation of persons engaged in commercial activities in or about the airport premises;

(3) The regulation of equipment and motor vehicles operated in or about the airport operational area;

(4) Airport security measures or requirements, and designation of sterile passenger holding areas and operational areas;

(5) The regulation of motor vehicles and traffic;

(6) Any other matter relating to the health, safety and welfare of the general public and persons operating, using, or traveling in aircraft.

(b) Definitions. For the purpose of this section, if not inconsistent with the context:

"Sterile passenger holding area" means any portion of a public airport designated by the director and identified by appropriate signs as an area into which access is conditioned

The second prong of the *Midcal* analysis compels this court to determine if the DOT, in its contracting and management of the airport system, is actively supervised and subjected to "pointed re-examination" of its policies by the state.[50]

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upon the prior inspection of persons and property in accordance with the approved Federal Aviation Administration air carrier screening program.

"Operational area" means any portion of a public airport, from which access by the public is prohibited by fences or appropriate signs, and which is not leased or demised to anyone for exclusive use and includes runways, taxiways, all ramps, cargo ramps and apron areas, aircraft parking and storage areas, fuel storage areas, maintenance areas, and any other area of a public airport used or intended to be used for landing, takeoff or surface maneuvering of aircraft or used for embarkation or debarkation of passengers.

Notwithstanding the restriction on access by the public into operational areas, entry may be authorized for airport operational area related purposes with the prior permission of the director or his duly authorized representative.

(c) Conformity to federal legislation and rules. No rules, orders, or standards prescribed by the director shall be inconsistent with, or contrary to, any act of the Congress of the United States or any regulation promulgated or standard established pursuant thereto.

(d) How made. All rules having the force and effect of law, shall be adopted by the director pursuant to chapter 91.

(e) Distribution. The director shall provide for the publication and general distribution of all of its rules and procedures having general effect. [L 1947, c 32, pt of § 1; RL 1955, § 15-18; am L Sp 1959 2d, c 1, § 26; am L 1965, c 96, § 11; HRS § 261-12; am L 1980, c 155, § 1]

[50] Of course when one considers that the DOT is composed of officers and agents of the state, the question becomes facetious. But for the sake of argument and in the hopes of exposing exactly why a *Midcal* analysis is unnecessary in such cases as this one, the court will overlook this obvious discontinuity. Especially since at least one other judge, sitting by designation in this district, overlooked this relationship and failed to grant the DOT state-action immunity for

Since the DOT is a state agency,[51] which must submit budgets and is funded by the state,[52] and whose director holds his office at the whim of the governor,[53] it is abundantly clear that the actions of the DOT are subjected to "pointed re-examination" by the state. By statute as well, H.R.S. § 261-7, the DOT is mandated to "actively supervise the operation of the contractors to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations . . . [and review] the reasonableness of contractors' price schedules . . . ." [54]

From the above, it is manifest that the DOT is, from every aspect, an instrumentality of the state. To ask if the state controls and reviews the DOT is to simply ask if the state exercises control over and governs its own actions.

The tautology is complete. The DOT, as an agent and instrumentality of the state, is controlled and reviewed constantly by the state. Since the DOT accounts directly to the state, and the state is merely acting through its agent, which performs and controls the action, this court can hardly imagine how the *Midcal* analysis could fail to

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a similar exclusive concession contract at HIA, this court wishes to spell out quite clearly this symbiosis. *Cf. Lei, Inc. v. Photo Management, Inc.*, Civ. No. 78-0263 (Opinion & Order filed February 4, 1980, by Judge Stanley Weigel). In short, the DOT is but an instrumentality created by the state to conduct certain specific state policies. The DOT exists only because of the state's grant of authority and only to perform the specific mandates outlined in its Organic Act. *See* nn. 51 & 53, *infra*, and accompanying text.

[51] The Department of Transportation was created by Haw. Rev. Stat. § 26-4(15) (1976); and is a unit within the office of the governor.

[52] *Ibid.*

[53] Haw. Const. Art. V, § 6.

[54] *See* n. 34, *supra*, for full text of § 261-7.

be satisfied.[55] As indicated above, in such situations as the present case, the *Midcal* test is simply not necessary to be made. But if made, as here done, it will almost certainly be met.

CONCLUSION

This court finds that the DOT is an instrumentality of the State of Hawaii. As such, the DOT's acts in regard to certain exclusive contracts at HIA are the acts of the state. Further, those acts relate to a fundamental governmental function, that is, the building, maintaining, managing and financing of a necessary statewide airport system for an island state. In so operating, the acts of the DOT are entitled to *Parker v. Brown* immunity against any claims of alleged violations of the Sherman Act.

For reasons heretofore stated, this court has considered and applied a *Midcal* analysis. The application of this superfluous analysis confirms this court's earlier conclusion. When the state is acting through one of its instrumentalities, the *Midcal* analysis logically should be satisfied automatically. The *Midcal* two-prong test having been met, the DOT's actions are entitled to the same *Parker v. Brown* immunity to antitrust suits as the state.

This court finds it unnecessary to consider the remaining claims of the plaintiff's complaint.

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is DENIED; and defendants' motion for summary judgment is GRANTED.[56]

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[55] Perhaps it is logically possible to postulate the ultimate "right hand in ignorance of the left hand's acts" sort of situation. But then the courts would be forced to decide which "hand" was the state.

[56] *See* Order Granting and Denying Motions for Summary Judgment, filed on September 2, 1982. *See also* n. 1, *supra*.

SHERMAN ACT

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 1.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 2.

HAWAII REVISED STATUTES

COMPRISING THE STATUTES
OF THE STATUTES OF HAWAII,
CONSOLIDATED, REVISED, AND ANNOTATED

§ 261-4 Airports, general. (a) Establishment, operation, maintenance. The department of transportation may on behalf of and in the name of the State, out of appropriations and other moneys available or made available for such purposes, plan, acquire, and establish, construct, enlarge, and improve in the manner herein provided, maintain, equip, operate, regulate, and protect, airports and air navigation facilities, including the construction, installation, equipment, maintenance, and operation at airports of buildings and other facilities for the servicing of aircraft or for the comfort, accommodation, and convenience of air travelers, and including protection against airport hazards. For such purposes the department may, by purchase, gift, devise, lease, condemnation in accordance with chapter 101, or otherwise, acquire property, real or personal, or any interest therein, including the property, rights, estates, and interests mentioned in section 262-11. The department may acquire rights and interests in airports owned or controlled by others, for the purpose of meeting a civilian need which is within the scope of its functions, even though it does not have the exclusive control and operation of such airports. No officer, board, or department of the State, or municipality, shall perform any function which is within the jurisdiction of the department without its approval, except for military purposes.

(b) Acquisition of real property. In the acquisition of real property and interests therein, the department of accounting and general services shall assist the department of transportation at its request, and assign thereto state officers and employees under its supervision for the making of surveys, abstracts, and otherwise as may be of

assistance, for which services the department of transportation shall pay out of the appropriations available to it, unless the department of accounting and general services has a general fund appropriation for such services.

(c) Structures and improvements. All structures and improvements to land shall be initiated by the department of transportation and shall be constructed or made by or under the comptroller, in conformity with plans and specifications approved by the department of transportation, for which purpose the department of transportation shall make allotments of the funds under its control for expenditure by the comptroller and for services of the department of accounting and general services for which the department has no general fund appropriation.

(d) Use of state and municipal facilities and services. In carrying out this chapter, the department of transportation may use the facilities and services of other agencies of the State and of the municipalities of the State to the utmost extent possible, and the agencies and municipalities shall make available their facilities and services. This subsection shall apply to the department of accounting and general services with respect to services and facilities in addition to those specified by subsections (b) and (c). [L 1947, c 32, pt of § 1; RL 1955, § 15-9; am L Sp 1959 2d, c 1, §§ 12, 26]

§ 261-5 **Disposition of airport revenue fund.** (a) All moneys received by the department of transportation from rents, fees and other charges pursuant to this chapter as well as all aviation fuel taxes paid pursuant to section 243-4(a)(2) shall be paid into the airport revenue fund created by section 248-8. All such moneys paid into the airport revenue fund shall be expended by the department for the statewide system of airports, including the construction of airports and air navigation facilities approved by the legislature, including acquisition of real

property and interests therein; and for operation and maintenance of airports and air navigation facilities; and for the payment of indebtedness heretofore or hereafter incurred by the department, or its predecessor, the Hawaii aeronautics commission, for any of the purposes of this chapter. The department shall generate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports and to comply with section 39-59; provided that as long as sufficient revenues are generated to meet such expenditures, the director of transportation may, in his discretion, grant a rebate of the aviation fuel taxes paid into the airport revenue fund during a fiscal year pursuant to sections 243-4(a)(2) and 248-8 to any person who has paid airport use charges or landing fees during such fiscal year. Such rebate may be granted during the next succeeding fiscal year but shall not exceed one-half cent per gallon per person, and shall be computed on the total number of gallons for which the tax was paid by such person, for such fiscal year.

(b) All expenditures by the department shall be made on vouchers duly approved by the director of transportation or such other officer as may be designated by the director. [L 1947, c 32, pt of § 1; RL 1955, § 15-10; am L Sp 1959 2d, c 1, § 26; am L 1962, c 24, §§ 2, 3; HRS § 261-5; am L 1968, c 20, § 2; am L 1969, c 10, § 6 and c 99, § 1]

§ 261-7 Operation and use privileges. (a) Under department operation. In operating an airport or air navigation facility owned or controlled by the department of transportation, or in which it has a right or interest, the department may enter into contracts, leases, licenses, and other arrangements with any person:

(1) Granting the privilege of using or improving the airport or air navigation facility or any portion or facility thereof or space therein for commercial purposes;

(2) Conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility;

(3) Making available services, facilities, goods, commodities, or other things to be furnished by the department or its agents at the airport or air navigation facility; or

(4) Granting the use and occupancy on a temporary basis by license or otherwise any portion of the land under its jurisdiction which for the time being may not be required by the department so that it may put the area to economic use and thereby derive revenue therefrom.

All the arrangements shall contain a clause that the land may be repossessed by the department when needed for aeronautics purposes upon giving the tenant temporarily occupying the same not less than thirty days' notice in writing of intention to repossess.

Except as otherwise provided in this section, in each case mentioned in paragraph (1), (2), (3) and (4), the department may establish the terms and conditions of the contract, lease, license, or other arrangement, and may fix the charges, rentals, or fees for the privileges, services, or things granted, conferred, or made available, for the purpose of meeting the expenditures of the statewide system of airports set forth in section 261-5(a), which includes expenditures for capital improvement projects approved by the legislature. Such charges shall be reasonable and uniform for the same class of privilege, service or thing.

(b) Under other operation. The department may, by contract, lease, or other arrangement, upon a consideration fixed by it, grant to any qualified person the privilege of operating, as agent of the State or otherwise, any airport owned or controlled by the department; provided that no such person shall be granted any authority to op-

erate the airport other than as a public airport or to enter into any contracts, leases, or other arrangements in connection with the operation of the airport which the department might not have undertaken under subsection (a) of this section.

(c) Miscellaneous fees and charges. The department may fix and regulate, from time to time, reasonable landing fees for aircraft and other reasonable charges for the use and enjoyment of the airports and the services and facilities furnished by the department in connection therewith, including the establishment of a statewide landing fee which may vary among different classes of users such as foreign carriers, domestic carriers, inter-island carriers, air taxi operators and such other classes as may be determined by the director of transportation, for the purpose of meeting the expenditures of the statewide system of airports set forth in section 261-5(a), which includes expenditures for capital improvement projects approved by the legislature.

(d) Liens. To enforce the payment of any charges for repairs or improvements to, or storage or care of any personal property made or furnished by the department or its agent in connection with the operation of an airport or air navigation facility owned or operated by the department, the department shall have liens on the property, which shall be enforceable by it as provided by sections 507-18 to 507-22.

(e) Buildings and land areas for general aviation activities; developmental rates. The department may from time to time establish developmental rates for buildings and land areas used exclusively for general aviation activities at rates not less than fifty per cent of the fair market rentals of the buildings and land areas and may restrict the extent of buildings and land areas to be utilized. [L 1947, c 32, pt of § 1; am L 1949, c 374 § 1; am L 1953; JR 14, § 1; RL 1955, § 15-12; am L Sp 1959 2d, c 1, § 26; am L 1962, c 24, §§ 4, 5; HRS § 261-7;

am L 1968, c 20, §§ 3, 4; am L 1972, c 14, § 1; am L 1976, c 235, § 2]

Haw. Rev. Stat. § 261-7, as amended by Act 90, 1982 Hawaii Sess. Laws

§ 261-7 Operation and use privileges. (a) Under department operation. In operating an airport or air navigation facility owned or controlled by the department of transportation, or in which it has a right or interest, the department may enter into contracts, leases, licenses, and other arrangements with any person:

(1) Granting the privilege of using or improving the airport or air navigation facility or any portion or facility thereof or space therein for commercial purposes;

(2) Conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility;

(3) Making available services, facilities, goods, commodities, or other things to be furnished by the department or its agents at the airport or air navigation facility; or

(4) Granting the use and occupancy on a temporary basis by license or otherwise any portion of the land under its jurisdiction which for the time being may not be required by the department so that it may put the area to economic use and thereby derive revenue therefrom.

All the arrangements shall contain a clause that the land may be repossessed by the department when needed for aeronautics purposes upon giving the tenant temporarily occupying the same not less than thirty days' notice in writing of intention to repossess.

Except as otherwise provided in this section, in each case mentioned in paragraphs (1), (2), (3), and (4),

the department may establish the terms and conditions of the contract, lease, license, or other arrangement, and may fix the charges, rentals, or fees for the privileges, services, or things granted, conferred, or made available, for the purpose of meeting the expenditures of the statewide system of airports set forth in section 261-5(a), which includes expenditures for capital improvement projects approved by the legislature. Such charges shall be reasonable and uniform for the same class of privilege, service, or thing.

The department shall enter into a contract with no more than one person ("contractor") for the sale and delivery of in-bond merchandise at Honolulu International Airport, in the manner provided by law. The contract shall confer the right to operate and maintain commercial facilities within the airport for the sale of in-bond merchandise and the right to deliver to the airport in-bond merchandise for sale to departing foreign-bound passengers.

The department shall grant the contract pursuant to the laws of this State and may take into consideration:

(1) The payment to be made on in-bond merchandise sold at Honolulu International Airport and on in-bond merchandise displayed or sold elsewhere in the State and delivered to the airport.

(2) The ability of the applicant to comply with all federal and state rules and regulations concerning the sale and delivery of in-bond merchandise; and

(3) The reputation, experience, and financial capability of the applicant.

The department shall actively supervise the operation of the contractor to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations of the contractor, and shall include guidelines

relating to the department's review of the reasonableness of contractor's price schedules, quality of merchandise, merchandise assortment, operations, and service to customers.

Apart from the contract described above, the department shall confer no right upon nor suffer nor allow any person to offer to sell, sell, or deliver in-bond merchandise at Honolulu International Airport; provided that this section shall not prohibit the delivery of in-bond merchandise as cargo to the Honolulu International Airport.

* * *

[am L 1981, c 243, § 2; am L 1982, c 90, § 2]

§ 261-9 **Contracts, law governing.** The department of transportation may enter into any contracts necessary to the execution of the powers granted it by this chapter. All contracts made by the department shall be made pursuant to the laws of the State governing the making of like contracts; provided, that where the planning, acquisition, construction, improvement, maintenance, or operation of any airport, or air navigation facility is financed wholly or partially with federal moneys, the department may let contracts in the manner prescribed by the federal authorities acting under the laws of the United States and any rules or regulations made thereunder. [L 1947, c 32, pt of § 1; RL 1955, § 15-15; am L Sp 1959 2d, c 1, § 26]

§ 261-12 **Rules, standards.** (a) Powers to adopt. The director of transportation may perform such acts, issue and amend such orders, adopt such reasonable general or special rules and procedures, and establish such minimum standards, consistent with this chapter, as the director deems necessary to carry out this chapter and to perform the duties assigned thereunder, all commensurate with and for the purpose of protecting and insuring the general public interest and safety, the safety of persons

operating, using, or traveling in aircraft, and the safety of persons and property on land or water, and developing and promoting aeronautics in the State. No rule of the director shall apply to airports or air navigation facilities owned or operated by the United States.

In furtherance of the duties assigned under this chapter, the director may adopt rules relating to:

(1) Safety measures, requirements and practices in or about the airport premises;

(2) The licensing and regulation of persons engaged in commercial activities in or about the airport premises;

(3) The regulation of equipment and motor vehicles operated in or about the airport operational area;

(4) Airport security measures or requirements, and designation of sterile passenger holding areas and operational areas;

(5) The regulation of motor vehicles and traffic;

(6) Any other matter relating to the health, safety and welfare of the general public and persons operating, using, or traveling in aircraft.

(b) Definitions. For the purpose of this section, if not inconsistent with the context:

"Sterile passenger holding area" means any portion of a public airport designated by the director identified by appropriate signs as an area into which access is conditioned upon the prior inspection of persons and property in accordance with the approved Federal Aviation Administration air carrier screening program.

"Operational area" means any portion of a public airport, from which access by the public is prohibited by fences or appropriate signs, and which is not leased or demised to anyone for exclusive use and includes run-

ways, taxiways, all ramps, cargo ramps and apron areas, aircraft parking and storage areas, fuel storage areas, maintenance areas, and any other area of a public airport used or intended to be used for landing, takeoff or surface maneuvering of aircraft or used for embarkation or debarkation of passengers.

Notwithstanding the restriction on access by the public into operational areas, entry may be authorized for airport operational area related purposes with the prior permission of the director or his duly authorized representative.

(c) Conformity to federal legislation and rules. No rules, orders, or standards prescribed by the director shall be inconsistent with, or contrary to, any act of the Congress of the United States or any regulation promulgated or standard established pursuant thereto.

(d) How made. All rules having the force and effect of law, shall be adopted by the director pursuant to chapter 91.

(e) Distribution. The director shall provide for the publication and general distribution of all of its rules and procedures having general effect. [L 1947, c 32, pt of § 1; RL 1955, § 15-18; am L Sp 1959 2d, c 1, § 26; am L 1965, c 96, § 11; HRS § 261-12; am L 1980, c 155, § 1]

§ 480-12 **Contracts void.** Any contract or agreement in violation of this chapter is void and is not enforceable at law or in equity. [L 1961, c 190, § 10; Supp, § 205A-10]

SESSION LAWS
OF
HAWAII

ACT 243

A Bill for an Act Relating to Transportation.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds and declares that:

(a) The State of Hawaii receives substantial revenues from the sale and delivery of in-bond merchandise to foreign-bound travelers departing from the Honolulu International Airport. In 1980 the State's airport special fund received over $30 million from such sales.

(b) Presently there are two competing businesses serving the duty-free market under contracts with the department of transportation. These contractors have guaranteed the airport special fund a minimum of $395,700,007 over the seven and one-half year life of the contracts.

(c) For the fiscal year 1981-1982, the revenues from the contracts are expected to provide forty per cent of the income of the airport special fund which supports all capital improvement programs and operating expenses and secures the revenue bonds for the state airport system.

(d) The addition of any more competition into this line of commerce may jeopardize these revenues and detrimentally affect the airport special fund.

(e) Tourism is, and will continue to be, one of the State's major industries. The economic welfare of the State and its citizens will depend in part upon the future of tourism in the State.

*** Except as to Section 6, the text has been edited pursuant to HRS § 23G-16.5, authorizing omission of the brackets, bracketed material, and underscoring.**

(f) Tourism in Hawaii is heavily dependent upon the national and international airline industry. If the revenues received by the airport special fund from the duty-free contractors are reduced, the airline industry landing fees will be increased correspondingly. There will be a detrimental effect on Hawaii's tourism industry if the airlines pass the additional cost on to the tourists through increased airline fares. Local consumers, of course, will also be paying higher air fares.

(g) Another important aspect of the State's tourism industry is the selling and delivering of in-bond merchandise to foreign-bound travelers.

(h) It is in the interest of the State and the State's tourism industry to insure that quality merchandise and excellent service at reasonable prices to departing foreign-bound travelers be established and maintained in the in-bond merchandise marketplace, taking into consideration the available physical facilities, personnel, logistical parameters, and competing interests at the Honolulu International Airport and within the State.

(i) Foremost among the concerns related to the addition of other competitors into the duty-free market are (1) whether the orderly administration of the airport and its facilities can be maintained and (2) the amount which can be assessed against additional competitors by the State for the privilege of delivering duty-free merchandise to the Honolulu International Airport.

(j) It is the policy of this State to protect the duty-free marketplace and thereby the tourist industry by limiting the number of duty-free operations to two and requiring that the State actively supervise their operations as a substitute for the competitive discipline of a free market economy. This Act will expire on June 30, 1982. It is intended that the Legislature will reexamine this Act during the 1982 Regular Session.

SECTION 2. Section 261-7, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) Under department operation. In operating an airport or air navigation facility owned or controlled by the department of transportation, or in which it has a right or interest, the department may enter into contracts, leases, licenses, and other arrangements with any person:

(1) Granting the privilege of using or improving the airport or air navigation facility or any portion or facility thereof or space therein for commercial purposes;

(2) Conferring the privilege of supply goods, commodities, things, services, or facilities at the airport or air navigation facility;

(3) Making available services, facilities, goods, commodoties, or other things to be furnished by the department or its agents at the airport or air navigation facility; or

(4) Granting the use and occupancy on a temporary basis by license or otherwise any portion of the land under its jurisdiction which for the time being may not be required by the department so that it may put the area to economic use and thereby derive revenue therefrom.

All the arrangements shall contain a clause that the land may be repossessed by the department when needed for aeronautics purposes upon giving the tenant temporarily occupying the same not less than thirty days' notice in writing of intention to repossess.

Except as otherwise provided in this section, in each case mentioned in paragraphs (1), (2), (3) and (4), the department may establish the terms and conditions of the contract, lease, license, or other arrangement, and

may fix the charges, rentals, or fees for the privileges, services, or things granted, conferred, or made available, for the purpose of meeting the expenditures of the statewide system of airports set forth in section 261-5(a), which includes expenditures for capital improvement projects approved by the legislature. Such charges shall be reasonable and uniform for the same class of privilege, service, or thing.

The department shall enter into separate contracts with no more than two persons ("contractors") for the sale and delivery of in-bond merchandise at Honolulu International Airport, in the manner provided by law. Each such contract shall confer the right to operate and maintain commercial facilities within the airport for the sale of in-bond merchandise and the right to deliver to the airport in-bond merchandise for sale to departing foreign-bound passengers.

The department shall grant such contracts pursuant to the laws of this State and may take into consideration:

(1) The payments to be made on in-bond merchandise sold at Honolulu International Airport and on in-bond merchandise displayed or sold elsewhere in the State and delivered to the airport.

(2) The ability of the applicant to comply with all federal and state rules and regulations concerning the sale and delivery of in-bond merchandise; and

(3) The reputation, experience, and financial capability of the applicant.

The department shall actively supervise the operation of the contractors to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations of such contractors, and shall include guidelines relating to the department's review of the reasonableness

of contractors' price schedules, quality of merchandise, merchandise assortment, operations, and service to customers.

Apart from the contracts described above, during the period ending June 30, 1982, the department shall confer no right upon any person to offer to sell, sell, or deliver in-bond merchandise at Honolulu International Airport."

SECTION 3. The provisions of this Act are declared to be severable and if any portion thereof is held to be invalid for any reason, the validity of the remainder of this Act shall not be affected.

SECTION 4. Statutory material to be repealed is bracketed. New material is underscored.*

SECTION 5. This Act shall take effect upon its approval and shall expire on June 30, 1982.

The foregoing became law on July 7, 1981, without the Governor's signature, pursuant to Art. III, § 16, State Constitution.

ACT 90

A Bill for an Act Relating to Transportation.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that tourism is the leading source of jobs and income for the people of the State of Hawaii. Therefore, tourism directly and indirectly provides a leading source of all state revenues. The present decline in the sugar and pineapple industries foreshadows an even greater importance of tourism to the State in the near future.

Today, virtually all of Hawaii's visitors arrive by air and make use of the Honolulu International Airport. The legislature finds that the operation of a functional, well-planned, and properly maintained Honolulu Inter-

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* The text has been edited pursuant to HRS § 23G-16.5, authorizing omission of the brackets, bracketed material, and underscoring.

national Airport is therefore a matter of compelling interest.

The State of Hawaii receives substantial revenues from the sales of in-bond merchandise to foreign-bound travelers departing from Honolulu International Airport, revenues that go to the administration of the facility and that are vital to its well-being. Additionally, a high-quality, duty-free operation at the Honolulu International Airport can in itself be an attraction of some magnitude to foreign visitors.

Therefore, the legislature finds that the necessity and importance of maintaining a healthy and high-quality, duty-free operation in the State cannot be understated.

However, the legislature also finds that the duty-free industry is as fragile as it is lucrative, subject to great potential harm by the forces and strains of unfettered competition.

Prior to January 1, 1981, the right to sell and deliver in-bond merchandise to foreign-bound travelers departing from Honolulu International Airport was an exclusive one which was granted pursuant to a competitive bid. On January 1, 1981, two competing contractors began to sell and deliver in-bond merchandise to Honolulu International Airport under separate seven and one-half year contracts with the department of transportation.

On September 12, 1981, approximately eight and one-half months after the two contractors had commenced operations, one of the contractors withdrew from the contract because of difficulty meeting its financial guarantee to the State. The recent withdrawal of one of the contractors is a serious concern of the legislature in that the State receives substantial revenues from the sale and delivery of in-bond merchandise at Honolulu International Airport.

The legislature has reexamined Act 243-81 and finds it to be in the best interest of the State to allow the in-bond marketplace to continue to operate under the protection of anti-trust immunity legislation.

Therefore, the legislature finds it is a matter of compelling state interest to displace unfettered business competition in the in-bond merchandise marketplace in order to maintain the health and quality of the industry and the ultimate health of the economy of the entire State.

The purpose of this bill is to provide a means to displace unfettered business competition in the duty-free industry in Hawaii and to effectuate the above-articulated state interests by limiting the number in-bond operations to only contractor, [sic] by providing that the department confer no right nor suffer nor allow any person to offer to sell, sell or deliver in-bond merchandise at Honolulu International Airport except as cargo, and by requiring that the State actively supervise the operations as a substitute for the competitive discipline of a free market economy.

SECTION 2. Section 261-7, Hawaii Revised Statutes, is amended by amending subsection (a) to read:

"(a) Under department operation. In operating an airport or air navigation facility owned or controlled by the department of transportation, or in which it has a right or interest, the department may enter into contracts, leases, licenses, and other arrangements with any person:

(1) Granting the privilege of using or improving the airport or air navigation facility or any portion or facility thereof or space therein for commercial purposes;

(2) Conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility;

(3) Making available services, facilities, goods, commodities, or other things to be furnished by the department or its agents at the airport or air navigation facility; or

(4) Granting the use and occupancy on a temporary basis by license or otherwise any portion of the land under its jurisdiction which for the time being may not be required by the department so that it may put the area to economic use and thereby derive revenue therefrom.

All the arrangements shall contain a clause that the land may be repossessed by the department when needed for aeronautics purposes upon giving the tenant temporarily occupying the same not less than thirty days' notice in writing of intention to repossess.

Except as otherwise provided in this section, in each case mentioned in paragraphs (1), (2), (3), and (4), the department may establish the terms and conditions of the contract, lease, license, or other arrangement, and may fix the charges, rentals, or fees for the privileges, services, or things granted, conferred, or made available, for the purpose of meeting the expenditures of the statewide system of airports set forth in section 261-5(a), which includes expenditures for capital improvement projects approved by the legislature. Such charges shall be reasonable and uniform for the same class of privilege, service, or thing.

The department shall enter into [separate contracts] *a contract* with no more than [two persons ("contractors")] *one person* (*"contractor"*) for the sale and delivery of in-bond merchandise at Honolulu International Airport, in the manner provided by law. [Each such] *The* contract shall confer the right to operate and maintain commercial facilities within the airport for the sale of in-bond merchandise and the right to deliver to the

airport in-bond merchandise for sale to departing foreign-bound passengers.

The department shall grant [such contracts] *the contract* pursuant to the laws of this State and may take into consideration:

(1) The payment [1] to be made on in-bond merchandise sold at Honolulu International Airport and on in-bond merchandise displayed or sold elsewhere in the State and delivered to the airport;

(2) The ability of the applicant to comply with all federal and state rules and regulations concerning the sale and delivery of in-bond merchandise; and

(3) The reputation, experience, and financial capability of the applicant.

The department shall actively supervise the operation of the [contractors] *contractor* to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations of [such contractors], *the contractor*, and shall include guidelines relating to the department's review of the reasonableness of [contractors'] *contractor's* price schedules, quality of merchandise, merchandise assortment, operations, and service to customers.

Apart from the [contracts] *contract* described above, [during the period ending June 30, 1982,] the department shall confer no right upon *nor suffer nor allow* any person to offer to sell, sell, or deliver in-bond merchandise at Honolulu International Airport[.]; *provided that this section shall not prohibit the delivery of in-bond merchandise as cargo to the Honolulu International Airport.*"

SECTION 3. Section 5, 243, Session Laws of Hawaii 1981, is amended to read as follows:

Notes

[1] Formerly read "payments".

"SECTION 5. This Act shall take effect upon its approval [and shall expire on June 30, 1982]."

SECTION 4. Statutory material to be repealed is bracketed. New material is underscored.

SECTION 5. This Act shall take effect upon its approval.

(Approved May 15, 1982.)

HAWAII CONSTITUTION

Article V

EXECUTIVE POWERS

Section 5. The governor shall be responsible for the faithful execution of the laws. The governor shall be commander in chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion. The governor shall, at the beginning of each session, and may, at other times, give to the legislature information concerning the affairs of the State and recommend to its consideration such measures as the governor shall deem expedient.

The governor may grant reprieves, commutations and pardons, after conviction, for all offenses, subject to regulation by law as to the manner of applying for the same. The legislature may, by general law, authorize the governor to grant pardons before conviction, to grant pardons for impeachment and to restore civil rights denied by reason of conviction of offenses by tribunals other than those of this State.

The governor shall appoint an administrative director to serve at the governor's pleasure. [Ren and am Const Con 1978 and election Nov. 7, 1978]

HAWAII CONSTITUTION

Article V

EXECUTIVE AND ADMINISTRATIVE OFFICES AND DEPARTMENTS

Section 6. All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same ac-

cording to common purposes and related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. That person shall hold office for a term to expire at the end of the term for which the governor was elected, unless sooner removed by the governor; except that the removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as provided by law. Such board, commission or other body may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

The governor shall nominate and, by and with the advice and consent of the Senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. If the manner or removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment

is confirmed, at the end of the next session of the senate. The person so appointed shall not be eligible for another interim appointment to such office if the appointment failed to be confirmed by the senate.

No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office.

Every officer appointed under the provisions of this section shall be a citizen of the United States and shall have been a resident of this State for at least one year immediately preceding that person's appointment, except that this residency requirement shall not apply to the president of the University of Hawaii. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

STATEMENT OF FACTS TAKEN FROM DEAK-PERERA'S MOTION FOR PARTIAL SUMMARY JUDGMENT, CR 51 AT 9-13

For partial summary judgment purposes, the material facts necessary to decide the issue of whether Defendants DOT, HIGASHIONNA, MIYAMOTO and CITICORP-USA are shielded from antitrust liability are relatively simple and uncontroverted. These facts have been admitted by Defendants in both their answers to the Complaint and/or in sworn testimony at deposition:

1. Plaintiff provides retail foreign exchange services at the HIA. (Admitted in Defendants' Answer to Complaint and in deposition of Ryokichi Higashionna at 16.)

2. Defendant DOT is the agency in charge of the HIA. Pursuant to statute and within the bounds of statutory authority, said Defendant has supervisory and administrative control over the HIA, and has responsibility for entering into contracts, leases, licenses and other arrangements relating to the supplying of goods, commodities, and services at the HIA. The HIA services both interstate and foreign carriers, and Defendant DOT is, and at all material times has been, engaged in interstate and foreign commerce. (Admitted in Paragraph 8 of Defendants' Answer to Complaint; deposition transcripts of Higashionna at 10-11; Shimada at 18-19; Toyama at 5-6; and Fukunaga at 7-12).

3. In his capacity as Director of the Department of Transportation, Defendant HIGASHIONNA caused to be published a Notice To Bidders on May 26, 27 and 28, 1982, soliciting bids for a five (5) year lease to operate the five (5) retail foreign exchange service locations at the HIA. In accordance with the Notice To Bidders, interested parties were required to submit their bid proposals by June 17, 1982, to Defendant MIYAMOTO in his capacity as Chief, Airports Division, Department of

Transportation, State of Hawaii. (Admitted in Paragraph 8 of Defendants' Answer to Complaint.)

4. The Notice To Bidders and the additional documents referred to therein solicited blanket bids for all five (5) foreign exchange locations situated throughout the HIA, rather than separate and individual bids in respect of each foreign exchange concession. (Admitted in Paragraph 8 of Defendants' Answer to Complaint.)

5. Under the terms of the Notice To Bidders and the accompanying documents, the successful bidder would be given a five (5) year lease, commencing on July 1, 1982, for the exclusive operation of all foreign exchange services at the HIA. Despite the availability of five (5) separate locations for foreign exchange services at the HIA, the general terms and conditions of the Notice To Bidders and the lease documents for the foreign exchange concessions provide in pertinent part that the successful bidder will have the "exclusive right" to use all five (5) foreign exchange locations in the HIA, and that the Defendant DOT will not grant or permit any other person during the terms of the lease to provide competitive foreign exchange services anywhere within the HIA. In this regard, the Notice To Bidders and the lease documents provide as follows:

> C. *Exclusiveness of Use.* The Lessee shall have the exclusive right to use the Premises as hereinabove indicated and the Lessor hereby covenants not to grant to any other person during the term of this Lease, the right to perform at the Airport any of the services enumerated in Paragraph A of this Article [i.e., foreign exchange services]. The Lessor's covenant shall also not be the basis for any action against the Lessor for any claims for diminution in rent or for any other damages, it being understood that the convenant is merely against an affirmative grant by the Lessor to any other person of rights or privileges

to have retail shop at the Airport similar to the concession granted hereby.

(Admitted in Paragraph 8 of Defendants' Answer to Complaint.)

6. Defendants intend to award an exclusive lease to the alleged successful bidder, Citicorp-USA. (Admitted in Paragraph 11 of Defendants' Answer to Complaint.)

7. The State legislature has not enacted any legislation regarding exclusive contracts for retail foreign exchange services. (Admitted in Paragraph 11 of Defendants' Answer to Complaint; deposition transcripts of Higashionna at 39-41; and Shimada at 38-40.) *

8. There are no comprehensive regulations passed pursuant to Chapter 91 of the Hawaii Revised Statutes governing the supervision of retail foreign exchange services at the HIA. (Admitted in depositions of Higashionna at 72; Miyamoto at Vol. II at 33; and Shimada at 62-64.)

9. Defendant DOT does not set any prices or commission rates in the area of retail foreign exchange, nor has DOT the expertise to conduct such activity. (*See* deposition transcripts of Shimada at 90; Miyamoto at Vol. II, at 34-36; Toyama at 29, 78; and Fukunaga at 39, 55-56.)

10. Although Defendant DOT, through its Airport Property Management Division, does somewhat generally monitor the exclusive leases at the HIA for violations of their provisions by examination of financial statements, these examinations are primarily for the purpose of ensuring that concessionaires are complying with the percentage rental financial arrangements, inapplicable to the

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Note: Subsequent to this filing, the State legislature enacted legislation enabling the Director of the DOT to grant an exclusive airport concession to Duty-Free Shops. *See* Haw. Rev. Stat. § 261-7, as amended by Act 90, 1982 Hawaii Sess. Laws.

present situation. (*See* depositions of Higasionna at 70; Toyama at 72; and Fukunaga at 14.)

11. The only other monitoring of the businesses of concessionaires is concerned with whether or not lessees are complying with other provisions of the lease, such as selling only designated items and operating their respective businesses within the space designated. (*See* depositions of Higasionna at 71; Toyama at 82; and Fukunaga at 12.)

12. Enforcement of the provisions of the current lease with Plaintiff at the HIA does not require DOT to actively supervise the retail foreign exchange business, e.g., by setting prices. At most, DOT may review the Plaintiff's rates if a consumer complaint is filed. However, no such incident was recalled by any State witness. (*See* depositions of Higasionna at 70; Miyamoto, Vol. II at 34, 36-40; Shimada at 99; and Toyama at 78-79.)

Office - Supreme Court, U.S.
FILED
MAR 1 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DEAK-PERERA HAWAII, INC.,

Petitioner,

VS.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII, *et al.*,

Respondents,

AND

CITICORP (USA), INC.,

Respondent-Intervenor.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Hawaii, acting in its sovereign capacity, through its Department of Transportation, in operating all commercial airports in the state, is entitled to *Parker* state action immunity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DEAK-PERERA HAWAII, INC.,

Petitioner,

VS.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII, *et al.*,

Respondents,

AND

CITICORP (USA), INC.,

Respondent-Intervenor.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondents, State of Hawaii Department of Transportation, Ryokichi Higashionna, and Owen Miyamoto, respectfully pray that a Writ of Certiorari not issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions quoted by Petitioner in the Appendix to its Petition, the following statutes are set forth in the Appendix:

Hawaii Rev. Stat. § § 26-4, 26-19, 261-10, and 261-11

COUNTERSTATEMENT OF THE CASE

The issue in this case is whether the State of Hawaii, acting as sovereign, through a state executive department, in performing a legislatively directed governmental function, is entitled to *Parker* state action immunity.

This case arises from the valid exercise of statutory powers by officials of the State of Hawaii Department of Transportation in operating a self-sufficient, state-wide, state-owned commercial airport system. A complete statement of the facts of this case is set forth in Judge Pence's decision (553 F.Supp. 976). In order to properly frame the issues, however, the following uncontroverted facts are highlighted.

A. Factual Background

Since the inception of scheduled commercial airline service in Hawaii in the 1920's, all commercial airports have been operated by first, the Territory of Hawaii, and since 1959, the State of Hawaii. 553 F.Supp. at 978.

Under the Hawaii Constitution, the executive branch of the state government is limited to "not more than twenty principal departments" and each is "under the supervision of the governor. Art. V, Sec. 6. Enabling legislation provides for seventeen principal departments, including the State Department of Transportation ("DOT"), the principal respondent herein. Hawaii Rev. Stat. § 26-4. Also, DOT "shall establish, maintain and operate transportation facilities of

the State, including . . . airports . . ." Hawaii Rev. Stat. § 26-19.

DOT's powers relating to airports are contained in the Aeronautics Act of 1947, Hawaii Rev. Stat. Ch. 261. DOT is authorized to establish, operate, and maintain airports as well as facilities for the convenience of air travelers.[1] At the same time, DOT is required to "generate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports."[2] DOT is authorized to arrange for services to be furnished directly by it[3] or to enter into contracts or licenses "conferring the privilege" of supplying goods or services.[4] DOT is also authorized to "establish the terms and conditions" of the contracts or licenses as well as "fix charges ... or fees" for the privileges conferred "for the purpose of meeting the expenditures of the statewide system of airports."[5] Moreover, a ban on the grant of exclusive aircraft facility rights "shall not prevent the making of contracts, leases, and other arrangements pursuant to section 261-7."[6] Finally, operation of airports and the exercise of powers granted in the Aeronautics Act are "declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity."[7]

Given this legislative directive to establish, maintain, and operate a statewide commercial airport system, the further legislative command that the system be self-sufficient, and

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[1]Hawaii Rev. Stat. § 261-4(a).

[2]Hawaii Rev. Stat. § 261-5(a).

[3]Hawaii Rev. Stat. § 261-7(a)(3).

[4]Hawaii Rev. Stat. § 261-7(a)(2).

[5]Hawaii Rev. Stat. § 261-7(a).

[6]Hawaii Rev. Stat. § 261-10.

[7]Hawaii Rev. Stat. § 261-11.

the obviously finite amount of space available in the airport terminals, DOT has used exclusive concessions to provide a variety of goods and services to "air travelers," one of which is the foreign currency exchange. 553 F.Supp. at 978.

Since at least 1972, Petitioner, Deak-Perera Hawaii, Inc. ("Deak"), had run the foreign exchange concession under two successive five-year contracts. 553 F.Supp. at 978. With the contract due to expire on July 1, 1982, DOT took bids on a new five-year contract, and bids were opened on or about June 17, 1982. *Ibid.*,at n. 13. Respondent-intervenor, Citicorp (USA), Inc., bid $1.25 million while Deak bid only $505,000.

B. Proceedings Below

Having lost the bid, Deak filed suit on June 28, 1982, alleging violations of federal and Hawaii antitrust laws and seeking injunctive relief (CR. 1). Following a hearing on June 30, 1982, a temporary restraining order preventing the signing of the contract by the State and Citicorp was issued (CR. 10).

On August 24, 1982, Deak moved for partial summary judgment on the issue of state action immunity, claiming that the State was not entitled to *Parker* immunity (CR. 51). Both Deak and the State filed memoranda on the issue of *Parker* state action immunity, the State also claiming Tenth and Eleventh Amendment immunity (CR. 52). Following a hearing on September 1, 1982, Senior District Judge Martin Pence decided that the State defendants were entitled to *Parker* immunity, and granted the State's motion for summary judgment and denied Deak's motion. 553 F.Supp. 976.

Deak made a timely appeal to the Ninth Circuit. On October 26, 1984, the Ninth Circuit unanimously affirmed Judge Pence's decision. 745 F.2d 1281. On January 24, 1985,

ninety days after entry of judgment, Deak filed its petition for certiorari.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit Properly Applied The Antitrust Immunity Standards Established By This Court

It is important to recognize at the outset that neither the Ninth Circuit nor the District Court has conferred automatic or blanket immunity on the State, its officers or agencies solely or even partly because of their status.

Instead, the lower court held that when DOT and its officials act, exercising powers granted to them under the Hawaii Aeronautics Act, it is the same "as if the State of Hawaii were acting", and hence the acts of DOT are entitled to state action immunity "as the acts of the State of Hawaii as sovereign." 533 F.Supp. at 985.

The Ninth Circuit affirmed, holding that the DOT's action was an action of the State of Hawaii "acting as sovereign," and therefore entitled to immunity. 745 F.2d at 1282. Thus, the Ninth Circuit's decision was based not on the status of DOT, but rather on the fact that the challenged acts were done in a sovereign capacity pursuant to an express legislative directive to run the airport in a self-sufficient manner. Hence, such acts were immune as sovereign state action under *Parker v. Brown*, 317 U.S. 341 (1943).

In *Parker*, the Supreme Court unanimously upheld a legislatively authorized program against antitrust (and Commerce Clause) attack:

> We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to

> restrain a state or its officers or agents from activities directed by its legislature.

317 U.S. at 350-51. That statement is still true today since the progeny, if anything, have "reaffirmed the vitality of the *Parker* state action doctrine." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982).

As this Court stated most recently in *Hoover v. Ronwin*, 80 L.Ed.2d 590, 599, 603 (1984):

> [U]nder the Court's rationale in Parker, when a state legislature adopts legislation, its actions constitute those of the State, . . . and ipso facto are exempt from the operation of the anti trust laws.
>
> In the years since the decision in *Parker*, the Court has had occasion in several cases to determine the scope of the state action doctrine. It has never departed, however, from *Parker*'s basic reasoning.
>
> * * * * *
>
> The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if a sovereign acted wisely after full disclosure from its sovereign officers. The only requirement is that the action be that of "the State acting as sovereign."

Hence, the Ninth Circuit's decision that DOT's exercise of statutory powers are acts of the state as sovereign entitled to *Parker* immunity is in line with the rationale of *Parker* and its progeny.

Moreover, the Hawaii Legislature has given DOT broad powers to carry out the legislative mandate of operating a self-sufficient commercial airport system, and left it up to DOT officials to decide how to best serve changing passenger needs, what goods or services to offer, and whether

this should be done directly by DOT employees or indirectly by exclusive contracts. DOT need not point to "specific, detailed legislative authorization", *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978), and as a "sovereign state representative," need not show a "clearly articulated and affirmatively expressed state policy" *Hoover*, 80 L.Ed.2d at 600. Instead, the challenged actions were clearly "acts of the state as sovereign", and the Ninth Circuit correctly held that DOT was entitled to *Parker* immunity.

II. The Ninth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits

In this case, the Hawaii Legislature, not the courts, has conferred certain powers on DOT and made their exercise "governmental functions." Ignoring this clear legislative action, however, Deak claims that there is neither express authority nor active supervision in this case. Deak implicitly contends that the "two-prong" test enunciated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is applicable to the actions of all antitrust defendants, whether state, local, or private.

Such an argument may have been appropriate several years ago when it was unclear whether *Midcal* was applicable to all defendants or just to private parties who were seeking to wrap themselves in "the gauzy cloak of state involvement." Since then, however, *Boulder* and *Hoover* have cleared up the confusion: the full force of *Midcal* applies only where private action is being challenged, the *Boulder* test is applicable when the challenged acts are those of a political subdivision, and sovereign state actions are still immune under *Parker*.

Other circuits have recognized that *Midcal* properly applies only to private parties claiming *Parker* immunity, and

that the *Midcal* test is inappropriate where "local action" of political subdivisions is involved. *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805, 809 (10th Cir. 1982), *cert. denied*, 459 U.S. 1126 (1983); *All American Cab Co. v. Metropolitan Knoxville Airport Authority*, 547 F.Supp. 509, 511 (E.D. Tenn. 1982), *aff'd mem.*, 723 F.2d 908 (6th Cir. 1983); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 384-85 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (June 11, 1984) (82-1832); *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3039 (July 25, 1983) (83-138); *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 428 (8th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3441 (November 18, 1983)(83-825).

In contrast, the instant case involves the actions of a state[8] acting as sovereign rather than local governmental action. Deak fails to appreciate that critical distinction, contending instead that state agencies and departments (and by implication their "state actions") are analogous to cities. Thus, Deak's reliance on *Lafayette* and *Boulder*.

Deak's argument ignores completely the fact that states and cities (and their departments) are *not* the same or even analogous. This Court pointed out in *Lafayette*, 435 U.S. at 412, and again in *Boulder*, 455 U.S. at 50, that this is a nation of states rather than city-states, and that under the constitutional principle of federalism, only the federal and state governments are sovereign. Hence, Mr. Justice Bren-

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[8]The only case factually similar to Deak is *Ajax Aluminum, Inc. v. Goodwill Industries of Muskegon County*, 564 F.Supp. 628 (W.D.Mich. 1983). Like the district court in *Deak*, the court in *Ajax* concluded that the Michigan Department of Labor (and its private contractor) was a sovereign entity acting as the sovereign, and therefore entitled to *Parker* immunity. 564 F.Supp at 633.

nan's use of the term "limited state sovereignty" to indicate that sovereignty does not extend to *political* subdivisions such as municipalities (*Lafayette*) or even home-rule cities (*Boulder*).

In those instances when a state legislature has authorized a state executive department to act, such action is clearly entitled to *Parker* immunity as "state action," and the *Boulder* test for "local action" and the *Midcal* test for "private action" are inappropriate. The Ninth Circuit's decision in this case is therefore in line with those of other circuits which have rejected blanket application of the *Midcal* test to all antitrust defendants. Accordingly, there is no conflict among the circuits on this point such as would require review of this case by this Court.

III. The Lower Courts Are In Accord on the Applicable State Action Immunity Tests

Lower federal courts before and since[9] the *Midcal* decision have distinguished between state, local, and private action and have applied the appropriate test:

State action. The New Jersey Supreme Court's Advisory Committee on Professional Ethics was immune under *Parker* in *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978). The same result would occur today under *Bates v. State Bar of*

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[9]Immediately after *Midcal*, some courts believed, like Deak, that *Midcal* was to be applied to all defendants. For example, although the district court apparently held the Pennsylvania Horse Racing Commission, ostensibly a state agency, acting under broad statutory authority, immune under *Parker* in *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982), the circuit court affirmed on the basis of *Midcal*. *See also* the pre-*Boulder* decision, *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981), in which an exclusive municipal contract was tested under *Midcal*.

Arizona, 433 U.S. 350 (1977), and *Hoover*. *Accord, Feldman v. Gardner*, 661 F.2d 1295, 1306 (D.C.Cir. 1981), *cert. denied sub nom., Feldman v. District of Columbia Court of Appeals*, 458 U.S. 1106 (1982).

Local action. In *E.W. Wiggins v. Massachusetts Port Authority*, 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966), the exclusive fixed base operator contract awarded by MassPort was immune since the acts were done in the exercise of a valid governmental function; the same result would occur today under *Boulder*. Similarly, under Boulder, the city, MAST, and the contractor were immune in *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3039 (July 25, 1983).

Private action. In *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), the city's antitrust claims against a private utility company were properly tested under *Midcal*.

Rather than being in disarray, these cases cited by Deak show that lower federal courts, especially since *Boulder*, understand the limitations of *Parker*: where local governmental action is challenged, it must be tested under *Boulder*, while essentially private action must be tested under *Midcal*.

Neither *Boulder* nor *Midcal* provides an appropriate test where the challenged acts are clearly those of a "sovereign state representative," such as the Hawaii Department of Transportation (and its officials), acting pursuant to a statute, such as Hawaii Rev. Stat. Sec. 261-11, which expressly makes the exercise of the granted powers "public and governmental functions." Instead, the proper test in that case is whether the challenged actions are those of the state in its sovereign capacity. And when the courts, as in this case,

have no doubt that the challenged actions are the acts of the sovereign, *Parker* applies.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be DENIED.

DATED: Honolulu, Hawaii, March 1, 1985

Respectfully submitted,

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APPENDIX

HAWAII REV. STAT.

§ 26-4 Structure of government. Under the supervision of the governor, all executive and administrative offices, departments, and instrumentalities of the state government and their respective functions, powers, and duties shall be allocated among and within the following principal departments which are hereby established:

(1) Department of personnel services (Section 26-5)
(2) Department of accounting and general services (Section 26-6)
(3) Department of the attorney general (Section 26-7)
(4) Department of budget and finance (Section 26-8)
(5) Department of commerce and consumer affairs (Section 26-9)
(6) Department of taxation (Section 26-10)
(7) University of Hawaii (Section 26-11)
(8) Department of education (Section 26-12)
(9) Department of health (Section 26-13)
(10) Department of social services and housing (Section 26-14)
(11) Department of land and natural resources (Section 26-15)
(12) Department of agriculture (Section 26-16)
(13) Department of Hawaiian home lands (Section 26-17)
(14) Department of planning and economic development (Section 26-18)
(15) Department of transportation (Section 26-19)
(16) Department of labor and industrial relations (Section 26-20)
(17) Department of defense (Section 26-21) [L Sp 1959 2d, c 1, § 3; am L 1961, c 132, § 1(a); am L 1963, c 2,

§ 1 and c 114, §§ 2, 4; Supp, § 14A-1; HRS § 26-4; am L 1970, c 105, § 4, am L 1982, c 204, § 8]

HAWAII REV. STAT.

§ 26-19 Department of transportation. The department of transportation shall be headed by a single executive to be known as the director of transportation.

The department shall establish, maintain, and operate transportation facilities of the State, including highways, airports, harbors, and such other transportation facilities and activities as may be authorized by law.

The department shall develop and promote ridesharing programs which shall include but not be limited to, carpool and vanpool programs, and may assist organizations interested in promoting similar programs, and arrange for contracts with private organizations to manage and operate these programs. Ridesharing programs include informal arrangements in which three or more persons ride together in a motor vehicle for four or more days a week to or from work or school.

The functions and authority heretofore exercised by the department of public works with respect to highways are transferred to the department of transportation established by this chapter.

On July 1, 1961, the Hawaii aeronautics commission, the board of harbor commissioners and the highway commission shall be abolished and their remaining functions, duties, and powers shall be transferred to the department of transportation.

Upon the abolishment of the Hawaii aeronautics commission, the board of harbor commissioners, and the highway commission, there shall be established within the depart-

ment of transportation a commission to be known as the commission on transportation which shall sit in an advisory capacity to the director of transportation on matters within the jurisdiction of the department of transportation. The commission on transportation shall consist of not more than eleven members, with the number of members from each county insofar as practicable being approximately proportional to the population of the respective counties to the population of the State; provided that each of the four counties shall be represented by at least one member. [L Sp 1959 2d, c 1, § 26; Supp, § 14A-25; HRS § 26-19; am L 1980, c 220, §§ 1, 2; am L 1981, c 140, § 1; am L 1983, c 43, § 1; am L 1984, c 233, § 1]

HAWAII REV. STAT.

§ 261-10 Exclusive rights prohibited. The department of transportation shall grant no exclusive right for the use of an airway, landing area, or air navigation facility under its jurisdiction. This section shall not prevent the making of contracts, leases, and other arrangements pursuant to section 261-7. [L 1947, c 32, pt of § 1; RL 1955, § 15-16; am L Sp 1959, 2d, c 1, § 26]

HAWAII REV. STAT.

§ 261-11 Public purpose of activities. The acquisition of any lands or interests therein pursuant to this chapter, the planning, acquisition, establishment, construction, improvement, maintenance, equipment, and operation of airports and air navigation facilities; and the exercise of any other powers granted by this chapter to the department of transportation are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity. All lands and other property and privileges acquired and used by or on behalf of the State in the manner and for the purposes enumerated in this chapter shall and are declared to be acquired and used for public and governmental purposes and as a matter of public necessity. [L 1947, c 32, pt of § 1; RL 1955, § 15-17; am L Sp 1959 2d, c 1, § 26]

Supreme Court, U.S.
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No. 84-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DEAK-PERERA HAWAII, INC.,
Petitioner,
v.
DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII, *et al.*,
Respondents,
and
CITICORP (USA), INC.,
Respondent-Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER DEAK-PERERA HAWAII, INC.

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IN THE

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DEPARTMENT OF TRANSPORTATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER DEAK-PERERA HAWAII, INC.

The State of Hawaii contends that the Department of Transportation ("DOT") *is* the sovereign. Its premise is that the DOT is the ultimate policy-making authority in Hawaii in regulating competition at the airport.

That premise is thoroughly unsound. The Hawaii Constitution neither creates, nor references, much less vests such authority in, a department of transportation. The sovereign in this area is the Legislature, which created and empowered the DOT. That the Legislature is the

ultimate authority in this area is evident in the fact that it has required the DOT to conform to federal and state laws [1] and specifically has authorized the DOT to enter into an exclusive contract at the airport in violation of those laws in but one line of commerce.[2]

Sovereign immunity can be conferred on the DOT in this case only upon further analysis, pursuant to tests pronounced by this Court. Yet the lower courts have foregone this analysis.

If the decision of the Ninth Circuit is allowed to stand, the intercircuit conflicts on the state action doctrine will surely be compounded. Most important, the decision encourages dislocation of competition by state functionaries acting at their own direction, which thereby raises doubts about the continuing vitality of this Court's *Midcal* [3] test and recent state action decisions.

Respectfully submitted,

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[1] *See* HAWAII REV. STAT. § 261-9 (App. 41a) *and* § 261-12(c) (App. 43a).

[2] *See* Act 90, 1982 Hawaii Sess. Laws (App. 48a), codified in HAWAII REV. STAT. § 261-7, as amended.

[3] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).